

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2076 OF 2018
ALONGWITH
NOTICE OF MOTION (L) NO.508 OF 2018**

Jay Constructions

..Petitioner

Vs.

Mahanagar Telephone Nigam Limited & Ors. ..Respondents

**Mr.Ramesh Ramamurthy alongwith Mr.Reshant Shah I.by Lex Conseiller
for the Petitioner/Applicant.**

Mr.Niranjan Shimpi for Respondent Nos.1 to 3.

**CORAM :R. M. SAVANT, &
K.K. SONAWANE ,JJ
DATE : 23rd AUGUST, 2018**

P.C.

1 At the outset, the learned counsel for the Petitioner seeks deletion of the name of Respondent No.4 from the array of Respondents. The said Respondent is accordingly deleted at the risk of the Petitioner.

2 Rule with the consent of the learned counsel for the parties made returnable forthwith and heard.

3 The above Writ Petition filed under Article 226 of the Constitution of India interalia seeks the following two reliefs :

“(i) Declare that Eligibility Condition 3 of the tender as void and not binding upon the Petitioner;

(ii) Declare that communication dated 09/04/2018 (Exhibit L) issued by the respondent No.3 to the Petitioner, is absolutely illegal and improper.”

4 The Petitioner consequentially seeks quashing and setting aside of the eligibility condition No.3 of the tender condition and communication dated 9th April 2018 based on the said condition.

5 The facts giving rise to the Petition in a nut shell can be stated thus :

The Respondent herein invited tenders for maintenance of the Telephone Exchange Buildings as well as rehabilitation, maintenance and construction of cable duct system on its telephone exchanges in Mumbai, Navi Mumbai and Thane. The said tenders interalia are for carrying out 100 works at various telephone exchange buildings at the aforesaid three places.

6 In the context of the challenge raised in the above Petition, condition No.3 of the Term and conditions is relevant and is reproduced hereinunder :

Eligibility conditions & Similar work definition:

The intending tenderers should have executed at least three works of the magnitude indicted below. The similar work definition shall include repairs and/or rehabilitation of manholes/hand holes/pulling chambers and duct construction/duct connectivity works pertaining to underground cable duct/sewer/water supply lines/construction and Maintenance of Buildings etc. and hence experience of this type of work shall be considered for fulfilling the requirements of experience. However

the pipes provided for road crossing under C.C. roads shall not be considered under the category of underground cable duct (civil) works. The intending Tenderers who are black listed/prevented/debarred from issuing/quoting tenders by any Central Govt./ State Govt./Central & State Govt. Public Sector Undertakings/ Enterprise during last seven years shall not be eligible to quote for this tender.

7 Hence, by the said condition, the tenderers who are black listed or debarred by any Central Government, State Government or Central Government or State Government Public Sector Undertaking, during the last 7 years were not eligible to quote for the said tender. The Petitioner applied for the said tender. The Petitioners case was considered and the Petitioner was disqualified from participating in the said tender on the touchstone of the said condition No.3 of the Terms and Conditions as the Petitioner was debarred by the Airport Authority of India. This disqualification of the Petitioner was communicated to the Petitioner by letter dated 9th April 2018 which letter as indicated above has been impugned in the above Petition.

8 Insofar as the said condition is concerned, it is required to be noted that the Petitioner was debarred by the Airport Authority of India which is a Government of India Undertaking vide communication dated 28th April 2017 for a period of three years. The show cause notice, preceding the said communication, issued to the Petitioner was dated 3rd December 2013. The Petitioner, therefore, made a representation to the Airport Authority of India to make debarment of the Petitioner effective from 3rd December 2013

instead of 28th April 2017 i.e. the date of the letter. The said request of the Petitioner was accepted by the Airport Authority of India and the said debarment was, therefore, deemed to have been commenced from 3rd December 2013 for a period of three years. The Airport Authority of India vide its letter dated 23rd March 2018 accordingly communicated to the Petitioner the said fact, as also communicated to the Petitioner that the restraint on issue of tenders to the Petitioner has been lifted with immediate effect. In the context of the above Petition, what is significant to note is that the Airport Authority though debarred the Petitioner for a period of three years from 3rd December 2013, has thereafter lifted the debarment with immediate effect and therefore on the date when the Petitioner participated and filled up the present tender, the Airport Authority of India had already taken a decision and in fact as indicated above the Airport Authority of India had lifted the debarment. It seems that the Petitioner in the declaration in one of the forms has mentioned the said fact but the respondent No.1 did not accept the same as the Petitioner had not produced the communication from the Airport Authority of India as it had not received it.

9 It is in the backdrop of the aforesaid facts that the efficacy of the said Condition No.3 would have to be taken into consideration. In our view, if the Airport Authority of India has deemed it appropriate to lift the debarment against the Petitioner and permit the Petitioner to participate in its tenders.

Once that be so the operation of the said condition no.3 qua the Petitioner would be oppressive thereby depriving the Petitioner of its rights to participate in the tender. In our view, the said condition would have to be read down so as to result in permitting the Petitioner to participate in the tender.

10 Hence, in the facts and circumstances of the case as mentioned hereinabove, it is not necessary for us to strike down the said condition No.3. However, the said condition no.3 would have to be read down so as to facilitate the participation of the Petitioner in the tender in question. Since the challenge in the above Petition alongwith the Notice of Motion is based on the said Condition no.3 and the consequential communication to the Petitioner, which fact has also been reiterated before us by the learned counsel appearing for Respondent Nos.1 to 3, we are of the view that the said Condition no.3 in the facts and circumstances of the case would not operate in a manner so as to disqualify the Petitioner from participating in the tender.

11 We, however, make it clear that we have expressed no opinion as regards the eligibility of the Petitioner on the touchstone of the other terms and conditions which are applicable to the tender in question. We are now informed that fresh tenders have been called for 87 works out of the 100 works which were invited by earlier tender and in respect of which the Petitioner has filed the above Notice of Motion, seeking the relief that the

Petitioner should be allowed to participate in the tenders floated. The last date for the said tender is 27th August 2018.

12 In the light of the aforesaid, we hold that the Petitioner would be entitled to participate in the said tender and would not be disqualified on the application of the said Condition No.3. However, as mentioned by us hereinabove, we express no opinion as regards the eligibility of the Petitioner on the touchstone of the other terms and conditions which are applicable to the tender in question.

13 The Petition is allowed to the aforesaid extent. Rule is accordingly made absolute, with parties to bear their respective costs. Parties to act on a copy of this order duly authenticated.

14 In view of the instant order, the above Notice of Motion also stands disposed of.

[K.K. SONAWANE, J]

[R.M.SAVANT, J]