IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.573 OF 2020

Ajay Deep Construction Private Limited,
A company duly registered under the
provisions of the Companies Act, 1956,
having its registered office at F-409,
Tower-II, R1, Sector 40, Seawoods,
Navi Mumbai 400 706
through its authorised signatory
Ajit Laxmanbhai Patel ..Petitioner

Vs.

1. The State of Maharashtra,
   Through the principal Secretary,
   Public Works Department,
   Maharashtra State,
   Mantralaya, Mumbai 400 032

2. The Secretary (Road),
   Public Works Department,
   Government of Maharashtra,
   4th Floor, Mantralaya, Mumbai

3. The Chief Engineer,
   Public Works Division,
   Bandhkam Bhavan,
   Aurangabad

4. The Superintending Engineer,
   Public Works Department,
   World Banks Project Division,
   Bandhkam Bhavan,
   Aurangabad

5. The Executive Engineer,
   World Banks Project Division,
   Bandhkam Bhavan, Adalat Road,
   Aurangabad

6. GNI Infrastructure Pvt. Ltd.,
a company registered under
the Companies Act,
having its registered office
at Gut No.123,
Chitegaon Taluka Paithan,
Dist. Aurangabad
Through its Managing Director

7. Manjeet Cotton Pvt. Ltd.,
a company duly registered
under the provisions of
the Companies Act,
having its registered office
at 318, N-3, CIDCO, Aurangabad
near Punjab National Bank,
through its Managing Director

8. Kalyan Tolls Infrastructure Ltd.,
a company duly registered under
the provisions of the Companies
Act, 1956, having its registered
office at Vidya Deep, 15/3,
Manoramaganj,
Indore – 452001 (Madhya Pradesh),
having its branch office in front
of Maria Hospital, Bansilal Nagar,
Aurangabad,
through its Managing Director

9. GNI Infrastructure Pvt. Ltd. and
Manjeet Cotton Pvt Ltd., a JV,
5-5-29, Kranti Chowk, Aurangabad,
Maharashtra – 431 001

10. MCGN Roadways Limited Liability
Partnership, having its registered
office at 5-5-29, Kranti Chowk,
Aurangabad,through Harvindersingh
Basantsingh Bindra ..Respondents

Mr.R.S.Deshmukh, Senior Advocate i/b. Mr.S.P.Pandav, Advocate for petitioner

Mr.S.G.Karlekar, AGP for respondent nos.1 to 5,

Mr.D.P.Palodkar, Advocate for respondent no.6, 7 and 10

Mr.S.C.Sarda, Advocate for respondent no.8

CORAM : S.V. GANGAPURWALA
AND
R.G. AVACHAT, JJ.
RESERVED ON : AUGUST 13, 2020
PRONOUNCED ON : SEPTEMBER 24, 2020

JUDGMENT *(PER R.G. AVACHAT, J.)*

Rule. Rule made returnable forthwith. Heard finally with the consent of learned Counsel for the parties.

2. This Writ Petition is filed with the following main relief :-

> *"(B-1) By a writ of mandamus or any other appropriate writ, order or directions in the like nature, the letter of award dated 08.01.2020, approval of SPV dated 31.01.2020 and all further consequential actions including concession agreement etc. taken by respondent nos.1 to 5 in favour of respondent no.9 may kindly be quashed and set aside."*

3. The facts, giving rise to the present petition, are as follows :-

Respondent no.1 is State of Maharashtra, in Public Works Department. Respondent nos.2 to 5 are Officers/instrumentalities of respondent no.1. Respondent nos.6 and 7 are the companies, which formed the consortium/joint venture i.e. respondent no.9. Respondent no.8 is a company, which had also participated in the tender process.

Respondent no.5 issued a tender notice for Hybrid Annuity Mode (HAM) online on 20.08.2019 for construction and widening of existing Beed bypass road, part of Aurangabad – Jalna, under World Bank Project Division, Public Works Division, Aurangabad. The petitioner is a company, registered under the Companies Act, engaged in construction business. The petitioner – company submitted the tender online. It fulfilled all the eligibility criterion prescribed in the tender conditions. Respondent nos.6 and 7 submitted the tender through their consortium/joint venture (JV) i.e. respondent no.9. The shares of respondent nos.6 and 7 in the consortium/JV is 65%:35%, respectively. Respondent no.8 also participated and submitted the tender online. In flagrant violation of the terms of the tender notice, the letter of award dated 08.01.2020 has been issued in favour of respondent no.9. The said letter of award is, therefore, under challenge in this Writ Petition.

4. Heard learned Counsel appearing for the parties. Perused the pleadings and relevant documents.

5. Mr.Deshmukh, learned Senior Counsel appearing for the petitioner – company, made submissions reiterating averments in the petition. He would submit that respondent nos.6 and 7, who are parties to the consortium/JV, did not have technical ability and financial capacity on the day of the tender notice. While respondent no.9 did not satisfy the technical ability, respondent no.5, in violation of the tender conditions, called upon respondent no.9 to make up the deficiencies. Respondent no.9, in turn, submitted some documents to make up the deficiencies. Those came to be incorporated/accepted in the tender process. Respondent no.7, who is a partner in the consortium/JV, did not have experience in construction business. It is engaged in the business of cotton. The agreement of consortium/JV entered between respondent no.6 and respondent no.7 indicates that there were two more

parties thereto. When the technical bid was opened, the petitioner – company raised objection in respect of respondent no.9 to the effect that PPP project's current liability has not been deducted from the net worth. In spite of the objections having been raised at the opening of the technical bid, the financial bid came to be opened immediately. The work experience and the documents were required only for the period of seven years next before the tender notice. The authorities have, however, considered the work experience of respondent nos.6 and 7 for eight years namely, 2011-12 to 2018-19. The figures of respondent no.7's business of cotton have also been considered. For calculating the technical capacity, turnover of civil work only was to be calculated. The turnover of other trades of respondent nos.6 and 7 have, however, been taken into consideration.

6. Mr.Deshmukh, learned Senior Counsel, would, further submit that the provisions made in common set of deviations namely, non-consideration of payments/receipts of less than Rs.15.45 Crores have also been violated. Respondent no.9 submitted forged documents, indicating combined

different works allotted under different tenders and made one certificate to overcome the said condition. According to him, the entire process adopted by respondent nos.1 to 5 in issuing the impugned letter of award is arbitrary, biased and showing favoritism. He would further submit that the method of calculations of score had not been followed properly. The figures shown in the documents submitted by respondent no.9 i.e. certificates of Chartered Accountants regarding constructions work, do not match with its balance sheet. In spite of the objection having been raised, the same was not considered.

7. The learned Senior Counsel has relied on the judgment of the Hon'ble Supreme Court in **Tata Cellular Vs. Union of India, (1994)6 SCC 651** and **Zenit Mataplast P. Ltd. Vs. State of Maharashtra and ors., (2009)10 SCC 388**, to submit that in case of a contract/tender, the State's action/decision must be in consonance with Article 14 of the Constitution of India. Where the decision/action is vitiated by arbitrariness, unfairness, illegal, irrationality, the Court would set right the decision making process. According to learned

Senior Counsel, since the action of the State in issuing the impugned letter of award is arbitrary, unreasonable and smacks of favoritism, the same is liable to be set aside.

8. Mr.Karlekar, learned AGP, would, on the other hand, submit that the Public Works Department issued letter dated 30.05.2019 instructing to incorporate condition of deduction of net liability of bidders from net worth, which was not incorporated in the tender. A meeting of the bid scrutiny committee was held on 16.12.2019 in the office of the Chief Engineer in the presence of authorised representative of the bidders. Technical bid evaluation was discussed and finalised in the said meeting. A representative of the petitioner–company was present in the meeting. The petitioner–company did not raise any objection. Financial evaluation was carried out and submitted to respondent no.1. The tender was approved at the Government level. The Request for Proposal (RFP) mentions that technical experience claimed, shall be supported by the Chartered Accountant’s certificate as per the format given at Anx–IV. The work of Rs.232 Crores of road improvement in HAM is in progress through the consortium/JV (respondent

no.9) and Sangle Construction. As such, it did have financial capacity and technical ability on the day of submission of the tender.

9. Learned AGP would further submit that as per the Government Resolution dated 17.09.2019, to increase competitive priced bidding, the financial envelope shall be opened after the contractor is given opportunity to submit additional information relating to technical envelope of the tender. Accordingly, both the petitioner – company and respondent no.9 were called for to explain/clarify on certain aspects of the matter. Both of them did avail the opportunity. Although the bidders had submitted additional data i.e. work experience of eight years, instead of seven years only, the relevant data has been considered for technical evaluation. He would further submit that the letter of acceptance has been issued to the lowest bidder respondent no.9 – consortium/JV. The petitioner – company was L-3 (lowest third).

10. Learned AGP would further submit that the work has to be completed in a time frame. The work has already been commenced. The threshold technical capacity worth Rs.309

Crores has been calculated considering equity holding of the partners of the consortium. As per Clause 2.1.15, the members in the consortium shall not exceed six. The consortium/JV agreement is executed in the format in tune with the requirement. The net worth certificate submitted by the bidders was checked and verified by the Chartered Accountant appointed by the tendering authority and on such verification, the consortium was found to be possessing net worth of Rs.75.72 Crores and as such, it qualified the requirement of financial capacity. He would further submit that the petitioner – company participated in the entire tender process. The objection has been raised with an ulterior motive only after the financial bid was finalised.

11. Mr.D.P.Palodkar, learned Counsel for respondent no.6, 7 and 10, would submit that the work in question has already been commenced. The work of HAM is time bound wherein, the contractor is required to utilise his substantial funds, which could be repaid in next ten years by the Government. He has reiterated the submissions made by learned AGP. The tender value is Rs.309 Crores. The bid of the

petitioner – company is of Rs.366.77 Crores, whereas the bid of respondent no.9 is of Rs.291.62 Crores, which is lower by Rs.76.88 Crores than the bid of the petitioner – company. The petitioner – company has simply asked for setting aside the letter of award as per D.S.R. rate. There would be again increase by 10% to 15% in the cost of tender work. According to Mr.Palodkar, the terms of invitation to tender are not open to judicial scrutiny, as the invitation to tender is the realm of the contract and the Government must have a fair play in its joints. In support of this submission, Mr.Palodkar has relied upon the judgment in the case of the Apex Court in the case of **Reliance Telecom Limited and anr. Vs. Union of India and anr., (2017)4 SCC 269.**

12. According to Mr.Palodkar, there is no overwhelming public interest involved in entertaining present petition. If the petition is allowed, a *denovo* process for issuance of tender may be required to be undertaken and the same would not be in the public interest. It would be at the cost of the State Exchequer. Learned Counsel, ultimately, urged for dismissal of the petition.

13. In the case of **Tata Cellular** (supra), the Hon'ble Supreme Court observed thus :-

> *"Administrative Law – Judicial review – Scope – Govt. contracts – Tenders – State decision/action on must be in consonance with Art.14 – Only the decision making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising power of review – Decision/action when open to review – Test – While court cannot interfere with Govt's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, but whether the decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or `Wednesbury unreasonableness' i.e. when decision is such as no reasonable person on proper application of mind could take or procedural impropriety, can be looked into by court – Test is whether wrong is of such a nature as it require intervention – If so court would set right the decision-making process – But it would not substitute its own opinion for that of experts….*

14. Let us examine the factual matrix in the light of legal proposition stated above.

An affidavit-in-reply was filed on behalf of respondent nos.1 to 5 by the Executive Engineer. The petitioner has not filed counter to the affidavit-in-reply. The affidavit-in-reply is complete answer to the contentions raised in the Writ Petition. The grounds raised in the Writ Petition are:

Lack of technical ability and financial capacity of respondent nos.6 and 7 on the day of the tender notice, etc.

15. The technical bids were opened on 18.09.2019 in the presence of the bidders including the petitioner and respondent nos.8 and 9. Government Resolution dated 17.09.2019 empowers the authorities concerned to seek clarification/explanation from the bidders. The object behind issuance of said Government Resolution is to have a competent bid and to avoid disqualification of bidder in the technical bid itself. In exercise of the powers under said Government Resolution, both the petitioner and respondent no.9 were called upon to submit clarification and additional documents, as the petitioner – company was not satisfying the requirements of net worth. The documents submitted by respondent no.9 – consortium also require clarification on the point of technical capability. Both the petitioner and respondent no.9 availed said opportunity. True, the Government Resolution dated 17.09.2020 or the terms thereof were not the part of the tender notice. The object of the Government Resolution, however, could not be taken exception to. The Officer

concerned, who failed to make said Government Resolution part of the tender notice, has been served with a notice to show cause. Since the authority concerned has acted in consonance with the Government Resolution dated 17.09.2019 and both the petitioner and respondent no.9 have availed opportunity to furnish clarification/explanation, the petitioner cannot be heard to say that the authorities concerned have acted in breach of the condition of the tender notice or thereby favored respondent no.9 – consortium.

16. The financial bids were opened in the presence of the representative of the petitioner and the representative of respondent no.9 on 16.12.2019. The representative of the petitioner was well aware of the fact that respondent no.9 was held to be technically qualified. The technical evaluation sheets were placed in the said meeting and thereafter only, the financial bids were opened considering all the bidders to be eligible in the technical bid. The representative of the petitioner did not raise any objection. Minutes of the meeting dated 16.12.2019, wherein financial bids were opened, have been produced on record. It was then too late in the day to raise an

objection. The petitioner-company, by its conduct, was, thus, estopped from raising any objection so far as regards technical and financial ability of respondent no.9 – consortium is concerned. The petitioner – company participated in the entire tender process and only after it realised to have not been granted the letter of award, it preferred to file present Writ Petition.

17. So far as regards the objection of consideration of the documents and figures relating to eight years next before the tender notice is concerned, it has been specifically stated that the documents and figures have been considered only for seven years starting from financial year 2012-13 to financial year 2018-19 and not from the financial year 2011.

18. As regards threshold technical capacity of Rs.309 Crores, the same is said to have been calculated considering the equity held by respondent nos.6 and 7 of the consortium. Page no.329 is a document indicating respondent no.9 – consortium to have met the threshold technical capacity of Rs.309 Crores. Said document has been signed by Technical Adviser, Chartered Accountant and officials of respondent nos.3

to 5. So far as regards the objection on the point of four partners of the consortium shown in the agreement, it has been stated that the agreement was in the prescribed format provided under the tender notice. Clause 2.1.15 specifies that the maximum members in a consortium not to exceed six. The joint venture agreement is stated to be in tune with the requirement. There is no bar to have two or more members in a consortium.

19. Documents at page nos.330 and 331 indicate financial capacity of respondent no.9 – consortium after denoting receipts in excess of Rs.15.45 Crores, while document at page no.332 suggests net worth of respondent no.9. The method of calculating score appears to have been followed, as is evident from the certificate (page no.332) verified by the Committee, of which a Chartered Accountant was one of the members.

20. It has specifically been denied that the projects which did not have receipt or payments in excess of Rs.15.45 Crores, have been taken into consideration. The technical capacity was assessed at Rs.329.69 Crores. The same is stated

to be as per the requirement of the tender notice. The net worth certificate submitted by the bidders have been checked and verified by the Chartered Accountant appointed by the tendering authority. On such verification, the net worth of respondent no.9–consortium was found to be Rs.75.72 Crores, qualifying the requirement of financial capacity.

21. The cost of tender work is Rs.309 Crores. The bid of the petitioner is of Rs.366 Crores, while the bid of respondent no.9 is Rs.291.62 Crores. As such, the bid of respondent no.9 is lower by Rs.74.38 Crores. The petitioner – company is lowest third. Even if the petition is allowed, the petitioner is not going to get the tender work. A *denovo* tender procedure will have to be undertaken. It is stated that there is increase, every year, in D.C.R. rate. The same will increase the cost of tender work. It will, ultimately, be the tax payers' money that will have to be spent. The Hon'ble Apex Court, in the case of **Bharat Coking Coal Ltd. Vs. AMR Dev Prabha, 2020 SCC OnLine SC 335,** relied upon paragraph 11 of the judgment of the Apex Court in the case of **Raunaq International Ltd. Vs. IVR Construction Ltd., (1999) 1 SCC 492**, which reads thus:-

> *"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition.* ***If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction.*** *It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost for more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."*
>
> *(emphasis supplied)*

In the case in hand, public interest demands that no interference, shall be made with the impugned letter of award/tender process. Moreover, the financial bids were submitted to the high-power committee headed by the

Additional Chief Secretary (Finance). The officials of respondent nos.3 to 5 were, in no way, involved in the process of accepting the financial bid.

22. There are photographs on record to indicate that the work has commenced soon after the letter of award was issued. There are no specific pleadings much less evidence as regards grounds of bias favoritism and arbitrariness in issuing the letter of award in favour of respondent no.9.

23. In the fitness of things, it would, therefore, be not justifiable to interfere with the completed tender process and to set aside the impugned letter of award.

24. The Writ Petition is, therefore, dismissed. Rule is discharged.

[**R.G. AVACHAT, J.**] [**S.V. GANGAPURWALA , J.**]

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