

AGK

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.11264 OF 2022

S. A. Sawant Constructions
Pvt. Ltd.

...Petitioner

V/s.

Nashik Municipal Corporation
& Ors.

...Respondents

Mr. S. M. Oak with Ms. Shraddha Chavan & Mr.
Vinod Utekar i/by Mr. Mahendra Agvekar for the
petitioner.

Mr. Rohit Sakhadeo for respondent nos.1 to 4.

**CORAM: DIPANKAR DATTA, CJ. &
MADHAV J. JAMDAR, J.**

DATE: SEPTEMBER 28, 2022

P.C.:

1. Nashik Municipal Corporation (hereafter "the Corporation", for short) issued e-Tender Notice No. 02 (2022-2023) on 27th June 2022 inviting bids for various road construction and other works. The petitioner, interested in the work listed at serial no.1, participated in the pre-bid meeting conducted by the Corporation. In such meeting, the petitioner specifically objected to clause no.12.2.(ii) of the notice reading as follows:

"12.2.ii. The bidder shall upload scanned copy of valid certificate of compliance required as per latest M.O.R.T.H. & specification from Assistant Chief Engineer

of (Mechanical) of PWD department (Govt. of Maharashtra) for concrete batch mix plant, concrete pump & all other allied required machinery with SCADA. **Successful bidder must connect their SCADA system to NMC SCADA Server on his own cost in Seven (07) days after work order.**

2. Along with the petitioner, other intending bidders had also raised objections. Upon consideration of such objections, the Corporation issued a clarification whereby clause 12.2.(ii) was modified and also notified. The modified clause reads as follows:

Sr.No.	Modified Clause
1.	***
2.	The para under clause 12.2.ii shall be read as "The bidder shall upload scanned copy of valid certificate of compliance required as per latest M.O.R.T.H. & specification from Assistant Chief Engineer (Mechanical) of PWD department (Govt. of Maharashtra) for concrete batch mix plant, with SCADA. Successful bidder must connect their SCADA system to NMC SCADA Server at his own cost in Seven (07) days after work order".

3. The petitioner tried to obtain the requisite certificate. According to the petitioner, there is a Government Resolution dated 27th September 2018 of the Public Works Department, Government of Maharashtra (hereafter "PWD, GoM", for short) which stipulates that if machinery required for road construction work is less than ten (10) years old, no such certificate would be required. Since the machinery it owns/possesses are all less than ten (10) years old, the PWD, GoM declined to issue a certificate of the nature required to be submitted in terms of the modified clause.

4. Despite having failed in its pursuit to obtain the requisite certificate from the PWD, GoM, the petitioner did not raise any objection before the Corporation nor approached this Court seeking an order on the Corporation not to insist on production of the certificate in terms of the modified clause. On the contrary, the petitioner participated in the process by offering its bid online.

5. By a communication dated 22nd August 2022, the Corporation informed the petitioner of rejection of its bid during technical evaluation on the ground of non-production/non-submission of M.O.R.T.H. certificate. This decision of the Corporation is challenged by the petitioner by instituting this writ petition dated 12th September 2022.

6. We have heard Mr. Oak, learned advocate for the petitioner and Mr. Sakhadeo, learned advocate for the Corporation as well as considered the materials on record, which includes a reply-affidavit filed by the Corporation opposing the prayer for admission and interim relief.

7. The Supreme Court in its decision in **National High Speed Rail Corporation v. Monte Carlo Ltd.**, reported in (2022) 6 SCC 401, has laid down the law in the following terms :

“41. Now so far as the view taken by the High Court in the impugned judgment and order that Clauses 28 under Clause (e) of Option A Section 1 and Clause 42.5 of ITB are patently illegal, inasmuch as they seek to curtail the right of the bidders to challenge the rejection of their bid in a multi-stage bidding process at the earliest, and before the award of the contract is concerned, at the outset, it is required to be noted that as such the aforesaid clauses of the ITB were not under challenge

before the High Court. Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 of ITB were well within the knowledge of the original writ petitioner at the time of participating in the tender process. The aforesaid clauses of the ITB were put to the knowledge of all the participants/bidders and the same applied to all. Despite the above clauses in the ITB, original writ petitioner participated in the tender process. Therefore, once having accepted the terms and conditions of the tender process with the full knowledge, thereafter, it was not open for the original writ petitioner to make a grievance with respect to such clauses."

(emphasis ours)

8. In view of the law laid down by the Supreme Court, it is not open to the petitioner, after participating in the process and after having found its bid to have been rejected, to turn around and question the propriety of the Corporation's insistence to produce the M.O.R.T.H. certificate which the petitioner could not procure from the PWD, GoM on the ground of its machinery being less than ten (10) years old. If indeed the version of the petitioner is to be believed, the petitioner ought to have approached the Court immediately after the PWD, GoM refused to issue the certificate of the nature required by the modified clause, instead of participating in the process.

9. Having submitted an incomplete application and after having faced the rejection of its bid, it is not open to the petitioner to knock the doors of the Court seeking interim relief.

10. We may also refer to the decision of the Supreme Court in **M/s. N. G. Projects Ltd. v. M/s. Vinod Kumar Jain & Ors.**, reported in (2022) 6 SCC 127. In such decision, the

Supreme Court reminded the High Courts of the provision contained in section 41(ha) of the Specific Relief Act, 1963. We may quote the relevant paragraph from the said judgment hereinbelow :

“21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while exercising its jurisdiction under Article 226 of the Constitution of India.”

11. In **M/s. N. G. Projects Ltd.** (supra), after consideration of various decisions including the decision in **Tata Cellular v. Union of India**, reported in (1994) 6 SCC 651, the Court proceeded to hold in paragraph 23 that “(I)f the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract.”

(emphasis ours)

12. Mr. Oak has brought to our notice the order dated 18th May 2022 of the Supreme Court in Civil Appeal No. 4140 of 2022 (**Jai Bholenath Construction v. The Chief Executive Officer, Zilla Parishad, Nanded & Ors.**) of the self-same Bench that decided **M/s. N. G. Projects Ltd.** (supra). Such decision cannot come to the rescue of the petitioner in view of the clear principles of law enunciated in paragraph 23 of the decision in **M/s. N. G. Projects Ltd.** (supra) and the observations in paragraph 21 thereof.

13. Since we are concerned with a case which relates to road construction work, the caution sounded by the Supreme Court cannot be lightly overlooked. We, therefore, find no reason to grant any interim relief to the petitioner.

14. Since grant of interim relief is being declined by us, we are also of the considered opinion that nothing would survive for decision on the writ petition having regard to the reasons we have assigned hereinabove. Based on such reasons, we dismiss the writ petition. There shall be no order as to costs.

15. It shall be open to the petitioner to pursue his remedy before the Civil Court in accordance with law.

Digitally
signed by
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GANESH
KULKARNI
Date:
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(MADHAV J. JAMDAR, J.)

(CHIEF JUSTICE)