

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

WRIT PETITION NO.1158 OF 2021

M/s. Fumes International & Anr. }		Petitioners
versus		
Mumbai Metropolitan Region }		
Development Authority & Anr. }		Respondents

**WITH
INTERIM APPLICATION (L) NO.24183 OF 2022
IN
WRIT PETITION NO.1158 OF 2021**

Wallop Advertising Pvt. Ltd. }		Applicant
In the matter between:		
Fumes International & Anr. }		Petitioners
versus		
Mumbai Metropolitan Region }		
Development Authority & Anr. }		Respondents

Mr. Venkatesh Dhond, Senior Advocate i/b. Mr. S. I. Menon for petitioners.

Mr. Saket Mone a/w Mr. Devansh Shah i/b. Vidhi Partners for respondent no.1 (MMRDA).

Mr. L. T. Satelkar, AGP for respondent no.2 (State).

Mr. Karl Tamboly a/w Mr. Mohammed Zain Khan and Mr. Faiyaz Khan i/b. One Legal for applicant in IAL/24183/2022.

**CORAM: DIPANKAR DATTA, CJ. &
M. S. KARNIK, J.**

DATE: JULY 28, 2022

P.C.:

1. The first petitioner entered into 6 (six) License Agreements with the first respondent, Mumbai Metropolitan

Region Development Authority (hereafter "MMRDA", for short), between 2008 and 2009, *inter alia*, for the purposes of building 5 (five) Public Sanitary Convenience (PSC) Complexes, i.e., public toilet blocks (hereafter "public toilets", for short) and two Garbage Collection Stations on a Build-Operate-Maintain-Transfer Basis (hereafter "BOT", for short) for a period of 10 (ten) years in and around the Bandra-Kurla Complex area. The said License Agreements contained a provision for an extension for a further period of 10 (ten) years on mutually agreed terms and conditions at the efflux of the said initial period of 10 (ten) years. The said License Agreements came to an end during 2018-2019. The petitioners addressed communications to the MMRDA seeking renewal of the said agreements. In furtherance thereof, the petitioners also paid over and the MMRDA unconditionally accepted the ground rents for the years 2019 to 2021. The said License Agreements, therefore, stood extended and/or were mutually accepted as having been extended. Despite this, the MMRDA floated the impugned tender dated 13th January, 2021 (hereafter "the impugned tender", for short) inviting bids from interested parties/agencies, *inter alia*, for the purposes of building more public toilets as also the maintenance of the petitioners' 5 PSCs and 2 Garbage Collector Stations. Aggrieved by the same, the petitioners instituted the present writ petition on the following grounds:

- (a) The License Agreements contain an express stipulation, at Cl.30, that the same will be renewed by the MMRDA on mutually agreed terms and conditions.

(b) The conduct of the MMRDA in unconditionally accepting the ground rent for the years 2019-2021 would show that the contract stood extended.

(c) Though the impugned tender was extended 11 times, there has been no response to the same from other parties as on 30th June, 2021;

(d) The first petitioner is ready and willing to double the amount paid to the first respondent as rent, with a 10% annual increase;

(e) The first petitioner's maintenance of the public toilets was met with praise, as per the letters dated 23rd June, 2016 and 9th February, 2016, addressed by the Bombay Municipal Corporation and the MMRDA respectively.

(f) The advertising fees of Rs.6 crore as claimed by the MMRDA initially under the impugned tender, for allowing the erection of advertisement hoardings, was subsequently relaxed on requests from various parties.

2. Based on the aforesaid pleadings in the writ petition, the petitioners have claimed the following substantive relief: -

“(a) Issue a Writ of Mandamus for the purpose of examining the legality and propriety in issuing the impugned tender dated 13th January, 2021 (at Exh.JJ, Pg.207-331) and, after examining the legality and propriety of the same, directing R1 to remove the 5 PSC Complexes and 2 Garbage Collection centers (being run by P1 on a BOT basis) from the impugned tender.”

3. The writ petition was heard by a coordinate Bench of this Court on 10th February 2021. Operative part of the order passed on that date reads as follows: -

"6. Clause No. 30 of the License Agreements, clearly states that the Agreements shall be renewed for further period of 10 years 'on mutually agreed terms and conditions'. The Petitioners have not been called upon, despite their letters dated 5th September, 2018 and 10th September, 2018, to decide the mutual terms and conditions and have straight away floated the tender. The last date of submission of bids is 12th February, 2021. The bids are to be opened on 15th February, 2021.

7. Having regard to the facts and circumstances of the case, by way of ad-interim order, we direct that though the bids may be accepted, the bids shall not be opened till the next date.

8. We record the statement of learned Counsel for the Respondent-MMRDA that in the event the Petitioners, without prejudice to their rights and contentions, desire to submit their bid, the same shall be accepted by the Respondent-MMRDA upto 15th February, 2021.

9. We permit the Petitioners to meet the Commissioner of the Respondent-MMRDA to negotiate the terms and conditions as stated in the Clause No. 30 of the license Agreements in respect of the 5 PSC Complexes and 2 Garbage Collection Centers which were allotted to the Petitioner No. 1. The partner/s of the Petitioner No. 1 shall meet the Commissioner, MMRDA on 15th February, 2021 at 12 noon. We make it clear that the issuance of the present tender shall not come in the way of the negotiation. This would obviously be without prejudice to the rights and contentions of the parties.

10. List the Writ Petition on 23rd February, 2021 **(HOB).**"

4. The Commissioner, MMRDA granted the second petitioner a personal hearing and thereafter, proceeded to pass an order dated 15th February 2021 rejecting the petitioners' claim for renewal. Such order has been challenged in the writ petition after an amendment thereof having been effected in terms of an order dated 25th February 2021. Prayer

clause (a1), which was inserted pursuant to the order dated 25th February 2021, reads as follows: -

“(a1) Quash and set aside the impugned order dated 15th February, 2021 (Exh. KK, Pg. 331A-331H) passed by R1 and issue an extension of the license agreements, entered into between P1 and R1, for a further period of 10 years.”

5. When the writ petition was listed before us on 18th July 2022, we had modified the interim order dated 10th February 2021 to the extent that the MMRDA shall be free to open the bids received from the prospective bidders in pursuance of the impugned tender, but would remain restrained from issuing the work order without the leave of the Court.

6. The writ petition has since been listed today for hearing. An interim application for intervention has been filed in the writ petition by the sole bidder, who was found eligible by the MMRDA in pursuance of the impugned tender.

7. We have heard Mr. Dhond, learned senior counsel for the petitioners, Mr. Mone, learned advocate for the MMRDA and Mr. Tamboly, learned advocate for the applicant in the interim application.

8. The sheet anchor of the petitioners' claim is clause 30 of the Licence Agreement reading as follows: -

“30. This Licence Agreement shall be renewed for a further similar period (10 years) on mutually agreed terms and conditions, subject to satisfactory services.”

9. Mr. Dhond stresses on the word “shall” and submits that the first petitioner has a right to claim renewal. Although the word ‘shall’ has been used in clause 30, we are of the clear opinion that the word ‘shall’ must be read as ‘may’ because

renewal is dependent upon fulfillment of twin conditions, i.e., (i) the parties must mutually agree to terms and conditions for such renewal of the Licence Agreement for a further period of 10 years; and (ii) the first petitioner's services must be satisfactory. If there are no mutually agreed terms and conditions between the parties or if the services rendered by the first petitioner are not found to be satisfactory, the question of renewal does not and cannot arise. Therefore, the right that clause 30 confers on the first petitioner is limited, in the sense that the right to claim renewal would be dependent on fulfillment of the aforesaid twin conditions. The discretion of the MMRDA to grant or refuse renewal that is inherent cannot be brushed aside.

10. We, therefore, reject the contention of Mr. Dhond that the word 'shall' in clause 30 means 'shall' and hold that the MMRDA could exercise discretion to refuse renewal, if mutually agreed terms and conditions for renewal of the Licence Agreements could not be arrived at.

11. While we hold so, we have no doubt in our mind that the order dated 15th February 2021 passed by the Commissioner, MMRDA is indefensible. Mr. Dhond is right in his contention that although the coordinate Bench, by its order dated 10th February 2021, had permitted the petitioners to meet the Commissioner to negotiate the terms and conditions for renewal of the Licence Agreements, the Commissioner erroneously assumed the role of an adjudicator between the petitioners and the officials of the MMRDA on whether renewal of the Licence Agreements ought to be granted or not. The order clearly reflects that the second petitioner was afforded a

personal hearing, without there being any element of a negotiation, whereafter the Commissioner proceeded to reject the prayer of the petitioners for renewal of the Licence Agreements on certain grounds, which we need not refer to in great detail at this stage or examine having regard to the clear language of clause 30 and the order dated 10th February 2021. In our view, the Commissioner ought to have called upon the petitioners to make their offer and upon negotiation, the Commissioner would have been justified in seeking to strike the best deal by calling upon the petitioners to raise their offer. In the alternative, the Commissioner could have given a counter offer and if the petitioners were unable to match the same, it would have been open for the Commissioner to communicate to the petitioners that because mutually agreed terms and conditions could not be worked out, the Licence Agreements have to be terminated. Unfortunately, the Commissioner did not proceed in this manner which was required of him in terms of clause 30. We, therefore, see no reason to uphold the order dated 15th February 2021 and it stands set aside, accordingly.

12. The matter is remitted to the Commissioner, MMRDA for consideration of the petitioners' claim for further renewal of the Licence Agreements, in accordance with law. Let an appropriate decision be taken as early as possible.

13. We, however, make it clear that since the impugned tender was also in respect of setting up and operating and maintaining environment friendly toilets at 10 (ten) locations and erection of 2 (two) advertisement hoardings in Bandra-Kurla Complex in lieu of advertisement rights for a period of 5

(five) years on Design-Built-Maintain-Operate and Transfer (DBMOT) basis and the applicant has participated and even emerged as successful, the MMRDA shall be at liberty to issue work order only in respect of the aforesaid items.

14. We make it clear that if the petitioners' claim for renewal is rejected, they shall be communicated such decision and for a period of a week thereafter, no work order shall be issued to the applicant in respect of operation and maintenance of the existing 5 (five) number of public toilets for which Licence Agreements were executed by and between the first petitioner and the MMRDA in 2008-2009.

15. With the aforesaid directions, this writ petition stands disposed of. No costs. All contentions on merit are left open.

16. In the light of the disposal of the writ petition on the aforesaid terms, the interim application too stands disposed of. No costs.

SALUNKE
J V

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by SALUNKE J V
Date: 2022.08.01
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(M. S. KARNIK, J.)

(CHIEF JUSTICE)