

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

WRIT PETITION NO. 3410/2020

(PRASHANT RAJENDRA MISHRA & OTHERS **VERSUS** NAGPUR MUNICIPAL CORPORATION,
NAGPUR & OTHERS)

WITH

WRIT PETITION NO. 3804/2021

(UJWALA ANIL NITHAVRE & OTHERS **VERSUS** NAGPUR MUNICIPAL CORPORATION, NAGPUR
& OTHERS)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders.*

Court's or Judge's order

Writ Petition No.3410 of 2020.

Shri Akshay Naik, counsel for the petitioners.

Shri S.K. Mishra, Senior Advocate with Shri A.M. Quazi, counsel for the R-1 and 2.

Shri S.P. Bhandarkar, counsel for the R-3 to 62.

Shri S.V. Bhutada, counsel for the R-63 to 101.

Writ Petition No.3804 of 2021.

Shri S.P. Bhandarkar, counsel for the petitioners.

Shri S.K. Mishra, Senior Advocate with Shri A.M. Quazi, counsel for the R-1 and 2.

Shri O.A. Ghare, counsel for the R-3 to 11.

Shri S.V. Bhutada, counsel for the R-12 to 93.

CORAM : A. S. CHANDURKAR AND SMT. M.S. JAWALKAR, JJ.

DATE : APRIL 13, 2022.

In view of notice for final disposal issued in these writ petitions, they have been heard together and are being decided by this common order.

2. On 02.11.2020, the Nagpur Municipal Corporation issued an E-Tender notice/request for proposal for transportation and distribution of drinking water by tankers in non-network area within the Corporation limits. This was for a period of two years. In the letter of invitation, it was stated that the Municipal Corporation was inviting request for proposal for fixing the per tanker trip rates for the work of transportation of water. It was stated that the rates would be decided by the Municipal Corporation after analyzing the tender rates submitted by the eligible bidders who had submitted their technical bids successfully as per the terms and conditions. Under Clause-D in

which the criteria for selection of vehicles was prescribed, it was stated that the registration of the vehicles ought to be from 2016 onwards. One bidder could register his bids with regard to two vehicles. After opening of the price bids the minimum rates would be analyzed by the Municipal Corporation by preparing a chart indicating the minimum rates prescribed alongwith vehicle numbers. Lots would be drawn from amongst those bidders whose rates were lowest and on the basis of such draw of lots, the eligible bidders would be selected.

3. The petitioners in Writ Petition No.3410 of 2020 are aggrieved with this mode of determining the successful bidders by draw of lots. Shri A.A. Naik, learned counsel for the petitioners submitted that in the tender notice a requirement of 194 water tankers was indicated. About 330 bids were found eligible from which the lots came to be drawn. Out of the fifteen petitioners, eight petitioners were selected and seven were left out despite quoting the minimum rate for transportation of water through tankers. The bidders having quoted the lowest rate and being willing to carry out the work at that rate, there was no justification in selecting the eligible bidders through draw of lots. Thus, it was submitted that even by quoting the lowest rates a bidder may not get the work order. The procedure adopted by the Municipal Corporation was based on a chance or lottery. There ought to be some legal certainty in the process of selecting a successful bidder which was absent in the present case. Placing reliance on the decisions in *Reliance Energy Ltd. & Another Versus Maharashtra State Road Development Corpn. Ltd. & Others* [(2007) 8 SCC 1], *Municipal Corporation, Ujjain & Another Versus BVG India Limited & Others* [(2018) 5 SCC 462] and *Municipal Council, Neemuch Versus Mahadeo Real Estate & Others* [(2019) 10 SCC 738], it was submitted that the method adopted by the Municipal Corporation was unsound and without any logic. On that count, the tender in question was bad and was liable to be set aside. Attention was also invited to the interim orders passed in the writ petition by which the petitioners were permitted to participate in the tender process

under protest and the same was made subject to the final result of the writ petition.

4. Shri S.K. Mishra, learned Senior Advocate for the Municipal Corporation opposed the aforesaid submissions. Inviting attention to the purpose behind the request for proposal it was submitted that the same was only for fixing the base price for supplying water through tankers. The terms were not such so as to favour any particular bidder nor were there any allegation regarding favouritism or malice against the Municipal Corporation. The object being competitive bidding, each bidder had extended his consent for doing work at the base price. There was no right in any of the bidder to be given the work order and there was a right of consideration of the bid which was done through draw of lots. Each petitioner having complied with the tender conditions it was clear that none of the petitioners found such condition to be unreasonable. Since the work to be undertaken was with regard to supply of water through tankers it was in public interest that a base price be fixed through competitive bidding. The learned Senior Advocate referred to the decision in *Jagdish Mandal Versus State of Orissa & Others* [(2007) 14 SCC 517] and submitted that the challenge as raised did not deserve acceptance.

5. Shri S.V. Bhutada, learned counsel for the respondent nos.63 to 101 also opposed the writ petition. He submitted that adoption of lottery/draw of lots method was not arbitrary as held in *Bhubaneswar Development Authority & Another Versus Adikanda Biswal & Others* [(2012) 11 SCC 731]. Referring to the decision in *Afcons Infrastructure Limited Versus Nagpur Metro Rail Corporation Limited & Another* [(2016) 16 SCC 818] it was urged that the scope of interference with tender conditions was limited and not wide as urged by the petitioners. Attention was also invited to the decision in **Writ Petition No.4195 of 2016** [*Nagpur Shahar Water Tanker Malak Welfare Association, Nagpur & Others Versus Nagpur Municipal Corporation & Others*] decided on 30.09.2016 in that regard.

6. In Writ Petition No.3804 of 2021, Shri S.P. Bhandarkar, learned counsel for the petitioners submitted that the Nagpur Municipal Corporation had sought to change the eligibility condition after issuance of the tender notice as a result of which certain bidders were subsequently added and they were permitted to participate in the tender process. Inviting attention to the technical qualifications as prescribed in the letter of invitation as well as Clause 7 pertaining to instructions for submission of bids, it was pointed out that initially 193 bidders were found qualified but subsequently their numbers were increased by permitting others to also participate. As a result there were 324 bidders in the fray. When the bids of about 137 bidders were not found to be eligible there was no question of permitting such bidders to subsequently participate in the tender process. It was thus submitted that by not following the tender conditions, the Municipal Corporation did not undertake the exercise in a fair manner depriving the petitioners of award of work order.

7. Shri S.K. Mishra, learned Senior Advocate for the Municipal Corporation opposed aforesaid submissions. According to the Corporation on a preliminary scrutiny of 330 bids, 193 bids were found to be complete with all documents. Thereafter, 137 bidders made a request for re-considering their bids since their bids were not considered for minor deficiencies. The Executive Engineer after considering Government Resolution dated 27.09.2018 permitted those bidders to remove the deficiencies. Thereafter on 06.04.2021 the final list of competent bidders had been published which was within the knowledge of all the petitioners. The petitioners failed to raise any objection or grievance with regard to the decision of the Competent Authority of permitting 137 bidders to cure the minor deficiencies. The challenge to that list was sought to be raised only on 27.09.2021 when the draw of lots was notified to be held on 29.09.2021. Infact, the petitioners had consented for doing the work at the minimum rate as per the communication dated 20.09.2021 at Rs.360/- per trip. Attention was also invited to the Corrigendum issued by the Superintending Engineer in which it was stated that the Income Tax Returns were required to be submitted prior to issuance

of the work order. Considering the nature of the request for proposal which was fixation of base price for transportation of water, those bidders found eligible were permitted to participate in the process. In absence of any material to indicate any *mala fide* exercise being undertaken by the Municipal Corporation, there was no reason to interfere in writ jurisdiction.

8. We have heard the learned counsel for the parties and we have perused the documents on record. We have also given due consideration to the rival submissions. In Writ Petition No.3410 of 2020 the challenge raised by the petitioners is to the mode and manner of selecting the lowest bidder who would be entitled to be issued a work order. As per the tender notice, after submission of the price bids the Municipal Corporation was to analyze the rates quoted by each bidder. List of bidders quoting the minimum rates was to be prepared and such bidders were to be treated as eligible for further participation. From these eligible bidders a draw of lots for each Zone of the Municipal Corporation was to be undertaken and based on such draw of lots the work order was to be issued. According to the petitioners the manner of selecting a successful bidder was left to chance as the Municipal Corporation was to undertake such selection by draw of lots. Having agreed to undertake the work at the lowest rate a bidder could not be told that issuance of the work order would depend upon draw of lots.

9. In this regard, the purpose of calling the request for proposal is relevant as urged on behalf of the Municipal Corporation. The same is to fix the base rate per trip for the work of transportation of water. It is in the interest of the Municipal Corporation to seek to get that work done at the lowest rate quoted by the bidders. The number of vehicles required was 194. Each bidder was permitted to submit his bid in respect of two vehicles registered in his name. The Municipal Corporation decided to select from amongst various lowest bidders a successful bidder by the draw of lots. Such method of determining a successful bidder from amongst various similarly placed bidders by draw of lots can hardly be said to be arbitrary. There is an equal chance to each lowest bidder and the bidder who is successful in the

draw of lots is entitled to get the work order. It cannot be said that by adopting such mode of determining a bidder entitled to carry out the work, the Municipal Corporation has acted arbitrarily. It is true that amongst various lowest bidders only a few would be awarded the work order depending upon the quantum of work indicated in the tender notice. But such mode of selecting the successful bidder cannot be said to be so arbitrary for being struck down. The Municipal Corporation being the principal it is entitled to determine the mode of selecting a successful bidder amongst various eligible bidders. In *Bhubaneswar Development Authority* (supra) it has been observed that selection by draw of lots in preference to allotment on 'first come first served' basis was not arbitrary. Merely because there could be another mode of determining a successful bidder, the same would not make the selection by draw of lots arbitrary. As held in *Jagdish Mandal* (supra), a judicial review of such action is not to examine whether a particular mode or manner of choice indicated in the tender document is sound or not but only whether it is lawful or not. It is likely that despite quoting the lowest rates, such bidder is ultimately not awarded the work order. There is no right to be issued a work order if there are number of bidders who have quoted the lowest rate. As held in *Afcons Infrastructure Limited* (supra), the principal having authored the tender document it is the best person to appreciate its requirements. In the absence of any *mala fides* or perversity in such appreciation or understanding, the Court would be slow in interfering in such matters. We therefore do not find that by adopting such mode of selection the Municipal Corporation has acted arbitrarily.

10. It was urged on behalf of the petitioners that there was absence of legal certainty in this process thus affecting the doctrine of level playing field. It has however been clarified in *Reliance Energy Ltd.* (supra) on which the learned counsel for the petitioners had placed reliance that the doctrine of level playing field was subject to public interest. It is only decisions or acts which result in unequal and discriminatory treatment that would violate the doctrine of level playing field. We do not find that any bidder has been treated

unequally or has been discriminated against. All lowest bidders have been clubbed together and on the basis of draw of lots the work order is sought to be issued. Hence on these counts, the decisions relied upon by the learned counsel for the petitioners do not support their contentions. We therefore do not find anything arbitrary in the mode and manner of determining a successful bidder through draw of lots.

11. Coming to the challenge raised in Writ Petition No.3804 of 2021, it is seen that the petitioners are basically aggrieved by the act of the Municipal Corporation in permitting the number of bidders to be increased from 193 to 324 while drawing lots for selecting eligible bidders to be issued work orders. According to the Municipal Corporation on a preliminary scrutiny of 330 bids it was found that the bids of 193 bidders were complete with all documents. On 23.02.2021, this list of eligible bidders was published. The Municipal Corporation thereafter received 137 applications from various bidders who were left out from that list in which those bidders stated that considering the difficulties faced by them while submitting the documents online they be permitted to remove the minor defects. These applications were filed between 02.02.2021 to 04.03.2021. The Competent Authority considered these applications and after following the guidelines as per Government Resolution dated 27.09.2018 permitted removal of such minor deficiencies. It was stated that of the 137 applicants, there were minor deficiencies in the documents of 134 bidders. They were permitted to remove the deficiencies. Thereafter on 06.04.2021 the list of valid bidders was published. It is the further case of the Municipal Corporation that despite publication of that list on 06.04.2021 no objection was raised by the petitioners to the aforesaid inclusion of 134 bidders. On the contrary on 16.09.2021 all 324 bidders gave their consent and willingness to provide services through their water tankers at the lowest base rate. It was only on 22.09.2021 which is after more than five months that such grievance was sought to be raised.

12. We again find that considering the purpose behind calling the request for proposal which was to fix the base rate for transportation and distribution

of drinking water per trip, the decision of the Municipal Corporation to permit 134 bidders to remove minor deficiencies in their documents to enable them to participate in the tender process cannot be said to be arbitrary or *mala fide*. The object being to determine the base price or rate to be charged per trip for the work of transportation it is but obvious that larger participation of bidders in the bidding process would have enabled the Municipal Corporation to fix the rate per trip after considering larger number of bids. It is not the specific case of the petitioners that with a view to accommodate particular bidders such exercise was conducted. There are no pleadings in the writ petition to that effect. Another relevant aspect which cannot be ignored is the inaction of the petitioners for a period of almost five months from 06.04.2021 when the final list of valid and competent bidders was published. After giving their consent to provide services at the base rate pursuant to the communication dated 16.09.2021, such objection has been raised by the petitioners only on 22.09.2021. There is no explanation for not raising such objection by the petitioners immediately after publication of the final list of the valid and competent bidders.

In this regard, we may refer to the decision in *Master Marine Services (P) Ltd. Versus Metcalfe & Hodgkinson (P) Ltd. & Another* [(2005) 6 SCC 138] wherein the Hon'ble Supreme Court has observed that even if there is some defect found in the decision making process by the tendering authority, the Court must exercise its discretionary powers under Article 226 of the Constitution of India with great caution and only if the same is in furtherance of public interest but not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to determine whether its intervention is called for or not. It is only when the Court comes to the conclusion that overwhelming public interest requires interference that it should so interfere. As stated above, while determining the base rate, number of bidders have been permitted to participate in that process. In absence of any specific allegation of *mala fides* or favouritism, larger public interest dissuades the Court from interfering under Article 226 of the Constitution of India on this count.

13. Hence, for aforesaid reasons we do not find any case made out in both the writ petitions to grant any relief under Article 226 of the Constitution of India. Writ Petition No.3410 of 2020 and 3804 of 2021 accordingly stand dismissed with no order as to costs.

At this stage, the learned counsel for the petitioners in Writ Petition No.3410 of 2020 prays that the interim arrangement that was operating till date be continued for a period of four weeks. This request is opposed by the learned counsel for the Municipal Corporation.

Considering the purpose behind issuing the tender notice which is transportation and distribution of drinking water, we do not find it expedient to continue the interim relief. The request is accordingly rejected.

(SMT. M.S. JAWALKAR, J.)

(A. S. CHANDURKAR, J.)

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