IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

911 WRIT PETITION NO.2197 OF 2022
WITH CA/8502/2022 IN WP/2197/2022

ELIXIER HOSPITALITY AND SECURITY SERVICES THROUGH ITS PROPRIETOR LATA KARBHARI JADHAVAR
VERSUS
DR. BABASAHEB AMBEDKAR MARATHWADA UNIVERSITY THROUGH ITS REGISTRAR AND OTHERS

Mr.R.S.Deshmukh, Sr.Counsel i/b Mr.S.M.Ganachari, Advocate for the Petitioner.
Mr.P.G.Tambade h/f Mr.N.Y.Kingaonkar, Advocate for Respondent No.2.
Mr.Y.B.Bolkar a/w Mr.A.A.Mishra, Advocate for Respondent No.3.
Mr.S.S.Thombre, Advocate for Respondent No.5.

(CORAM : RAVINDRA V. GHUGE AND SANJAY A. DESHMUKH, JJ.)

DATE : MARCH 30, 2023

PER COURT :

1. We have considered the submissions of the learned Senior Advocate representing the Petitioner and the learned Advocate on behalf of the Respondent/University. We have perused the first order passed by this Court dated 15.02.2022, which reads as under :-

"1. Learned Senior Advocate for the petitioner submits that the petitioner and respondent no.2 had participated in the tender process pursuant to the tender issued by respondent No.1. The petitioner and

respondent No.2 both were L-1 having quoted same rates. The petitioner raised objections stating that solvency submitted by respondent no.2 is forged document and the criminal case is also filed against respondent no.2 at Pune, so also, other objections were raised. Ignoring the same, the work order is issued in favour of respondent no.2 on 15.11.2021. Learned Senior Advocate submits that the petitioner is illegally debarred from participating without affording any opportunity to the petitioner. Recovery is sought from the petitioner without assigning any reason.

2. Issue notice to the respondents, returnable on 29.03.2022.

3. Hamdust allowed."

2. In a subsequent order dated 07.10.2022, this Court had restrained the University from opening the tender/awarding the tender to any of the bidders. It is undisputed that the Petitioner and Respondent No.2 were found to be the lowest bidders i.e. both were L-1 bidders.

3. On 18.11.2022, we had passed the following order :-

"1. After considering the brief submissions of the learned advocates for the respective sides, we have perused our order dated 7th October, 2022, which is passed on the contention of the petitioner that they were two L-1 bidders. Respondent No.2 is the said second L-1 bidder, who has withdrawn from the fray, leaving the petitioner as

the sole L-1 bidder. Instead of awarding the petitioner the contract, the University has floated a new advertisement. Having conveyed this to us, we directed the University to refrain from opening the tender or awarding the same to any bidder.

2. The submissions canvassed on behalf of the University before us today, is that the petitioner had issued a consent letter dated 8th October, 2021. The University called upon the petitioner to deposit security amount of Rs.25,00,000/-. An ultimatum was given by the University vide communication dated 20th October, 2021, in which two letters issued by the petitioner dated 8th October, 2021 and 18th October, 2021, are adverted to.

3. The learned advocate for the petitioner submitted, on instructions, that these two letters were never issued by the petitioner. Reliance is placed on the rejoinder affidavit dated 18th October, 2022, more specifically paragraph No.6, wherein the petitioner has contended that letter dated 18th October, 2021, as contended by the University, is false and incorrect.

4. We have perused the advertisement published by the University, which indicated that condition of security amount would not be made applicable to those bidders, who are Micro, Small and Medium Enterprises (MSME) and National Small Industries Corporation (NSIC). The petitioner is a proprietary concern, which is registered under the Maharashtra Shops and Establishments Act. Admittedly, the petitioner is neither MSME nor NSIC.

5. In the above backdrop, it is apparent that though the University called upon the petitioner to deposit the security amount, the petitioner was not willing. An ultimatum was give to the petitioner on 20th October, 2021 to deposit the security amount of Rs.25,00,000/-, failing which the petitioner would be deemed to have expressed it's refusal to perform the contract. Admittedly, the petitioner has not deposited the said amount. This petition has been filed on 3rd February, 2022.

6. All above aspects were not brought to our notice, when we passed the order on 7th October, 2022, thereby restraining the University from opening the tender. It is conceded that the petitioner has not applied to the University in pursuance to the e-tender advertisement dated 9th June, 2022. It is, thus, apparent that, on one hand, the petitioner did not agree to deposit the security amount though only the MSME or NSIC was to be exempted from depositing the same, and on the other hand, the petitioner by it's conduct, has not proceeded with the contract, which was allotted to it. Even the two letters addressed to the University by the petitioner dated 8th October, 2021 and 18th October, 2021 were not placed before the Court and these letters have been brought on record by the respondent University.

7. The learned advocate for the petitioner submits that the letter dated 8th October, 2021 was never issued by the petitioner to the University. We find that this would hardly make any difference, in the light of the fact that the petitioner has not denied vide the rejoinder affidavit that it did not receive the letter dated 20th October, 2021. The *fact remains that the rejoinder affidavit only states that the letter dated 8th October, 2021, as a consent letter, was never issued by the petitioner. In paragraph No.6 of the rejoinder affidavit dated 18th October, 2022, the petitioner states that the letter dated 20th October, 2021 issued by the University mentions that failure to pay security deposit would be considered as his "Non support" (meaning non-cooperation) to the tender contract.*

8. We are of the view that we passed the order dated 7th October, 2022, directing the University to defer the opening of the tender, on account of the above aspects having neither being pleaded nor mentioned to us. Had we noticed the above facts, we would not have issued the restraining order.

9. In view of the above, the order directing the University to refrain from opening the tender or awarding the tender to any bidder, stands vacated. No interim relief.

10. Stand over to 9th January, 2023."

4. It is thus apparent that since we were convinced that the Petitioner did not have the MSME and NSIC certificate, it was not exempted from depositing the security amount of Rs.25,00,000/-. Failure to deposit the amount was deemed to be an expression of refusal to perform the contract. Since we were given the impression

that the petitioner does not have the certificate, we vacated the interim order as is visible from paragraph No.9 of the reproduced portion hereinabove.

5. The learned Senior Advocate has placed before us a copy of the Certificate issued by Udyog Aadhar Memorandum, Ministry of Micro, Small and Medium Enterprises, Government of India dated 15.02.2014 indicating the name of the Petitioner, the name of the Entrepreneur and the date of commencement of the said certificate 15.02.2014, which would indicate that the Petitioner did have a MSME certificate. Since this document was not on record, we had drawn an impression in paragraph No.4 of our order dated 18.11.2022, that it was only those bidders who are micro, small and medium enterprise MSME or National Small Industries Corporation, who were eligible to seek waiver of deposit. Now that the said certificate is placed on record, which is marked as 'X-1' for identification, it is clear that the Petitioner was issued with such a certificate commencing from 15.02.2014. As such, if the Petitioner desires the benefits of seeking waiver of deposit, provided such is the condition set out in any tender document, the Petitioner will have to establish that it has such

certificate even today.

6. We have perused the resolution passed by the University concluding that, as the Petitioner has not tendered the security deposit amount, the Petitioner deserves to be blacklisted. We are of the view that the decision to blacklist an enterprise, is to be taken consciously, and without undue haste, provided the circumstances indicate a gross conduct or act on the part of such enterprise. Praying for a waiver from tendering the security deposit amount, is not an offence committed by an enterprise. If such an enterprise is not eligible for waiver, concerned authority can assign reasons and reject the request for waiver. As the Petitioner could not tender the security deposit of Rs.25,00,000/-, the worst that could have happened is that the tender would not have been granted to the Petitioner and despite being an L-I bidder, it's candidature could have been rejected. We find that the decision of the University to conclude that the Petitioner deserves to be blacklisted from it’s list, is not a commensurate action in the face of the fact that the Petitioner has not committed an offence or the conduct of the Petitioner enterprise is not so gross that it should be blacklisted.

7. In so far as proceeding with the earlier tender is concerned, the learned Advocate for the University has placed on record an e-mail received by him indicating that a decision has been taken by the University to float a fresh tender as the earlier tender process started more than 6 months ago, was not concluded and had become time barred. Copy of the said e-mail is taken on record and marked as 'X-2' for identification.

8. The learned Senior Advocate has been instructed by the Petitioner present in the Court that the Petitioner is willing to participate in the fresh tender process. It would produce the MSME certificate to the University in so far as the request for waiver of the security deposit is concerned.

9. In view of the above, this petition is partly allowed. The impugned decision of the University dated 30.12.2021 to blacklist the Petitioner, is quashed and set aside. The Petitioner would be at liberty to apply pursuant to a tender, if floated by the University and would be subject to the conditions set out therein. Needless to state, the Petitioner will have to produce the updated MSME certificate in order

to pray for waiver of tender security deposit, if that would be the condition in the tender document.

10. In view of the above, the civil application would not survive and stands disposed off.

(SANJAY A. DESHMUKH, J.) **(RAVINDRA V. GHUGE, J.)**