



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

BENCH AT AURANGABAD

WRIT PETITION NO.2054 OF 2020
WITH
CIVIL APPLICATION NO.13647 OF 2023

Dream Creation Advertising,
Through its Proprietor,
Shaikh Habib Shaikh Pasha,
Age-43 years, Occu:Business,
R/o-Seven Hill, Jalna Road,
Aurangabad.

...PETITIONER

VERSUS

- 1) The State of Maharashtra,
Through its Secretary,
Urban Development Department,
Mantralaya, Mumbai,
- 2) The Commissioner,
Municipal Corporation,
Aurangabad,
- 3) The Chief Executive Officer,
Aurangabad Smart City Development
Corporation Ltd. (ASCDCL),
Municipal Corporation, Aurangabad,
- 4) Proactive in and out
Advertising Pvt. Ltd.,
Through its Director,
Samkeet Apartment D Wing,
3rd Floor, Sant Janabai Marg of
Hanuman Road, Ville Parle East,
Mumbai-400057

...RESPONDENTS

...
Mr. Anandsingh S. Bayas Advocate for Petitioner.
Mr. S.K. Shirse, A.G.P. for Respondent No.1.
Mr. A.R. Vaidya Advocate for Respondent Nos. 3 and 4.
Mr. S.S. Bora Advocate for Respondent No.4.
...

**CORAM: SMT. VIBHA KANKANWADI AND
S.G. CHAPALGAONKAR, JJ.**

DATE : 13th MARCH, 2024

JUDGMENT [PER SMT. VIBHA KANKANWADI, J.] :

1. Rule. Rule made returnable forthwith. Heard learned counsel appearing for the respective parties finally, by consent.
2. Present Petition has been filed to challenge the acceptance or tender order dated 18th May 2019 issued by respondent No.3 in favour of respondent No.4, and also to declare that the rejection of the tender of the petitioner is incorrect and to set it aside, and also to consider the tender proposal of the petitioner on its own merits.
3. The facts which are not in dispute are that respondent Nos.2 and 3 had floated a tender as a part of Dream Project of Smart City. Decision was taken for construction, operation and

maintenance of bus shelter and for that purpose the said tender was floated on 29th January 2019. The online bid submission was till 4.00 p.m. of 14th February 2019. The said dead line was extended up-to 2nd March 2019 by granting three extensions till then i.e. firstly on 8th February 2019, secondly on 22nd February 2019 and lastly on 1st March 2019. In fact till 28th February 2019 respondent Nos. 2 and 3 had received only one tender i.e. of the petitioner on 26th February 2019. Instead of opening the tender submitted by the petitioner, the respondents had again extended the date till 2nd March 2019. The tender document of the petitioner was not accepted and the tender submitted by respondent No.4 has been accepted. The work order has also been issued in favour of respondent No.4 on 15th July 2019.

4. The petitioner has come with the case that respondent Nos. 2 and 3 were not giving any information about the tender process nor any document was supplied to the petitioner and therefore, he made application under Right to Information Act on 26th September 2019, however there was no response. In fact respondent No.4 had submitted the bid documents on 4th March 2019, which shows that only to adjust respondent No.4 the

extensions were given. The petitioner had again submitted application on 18th October 2019 asking for details and then he came to know about rejection of his bid on 9th May 2019 and allotment of work to respondent No.4. The petitioner contends that acceptance of the two tenders by respondent Nos.2 and 3 on 4th March 2019 was beyond the bid extension that was granted, which was till 2nd March 2019 only. The petitioner's bid was turned down on the ground that he has no experience of civil work. In fact there was no requirement of civil work in the construction of bus shelter and therefore the rejection of the tender of the petitioner on that ground is incorrect. Since work has been illegally allotted to respondent No.4, the present Petition has been filed.

5. One Sanjay Vamanrao Supekar has filed affidavit-in-reply on behalf of respondent Nos.2 and 3, who appears to be an employee of respondent No.2. According to him, the bid was through the government e-portal and when only one bid was received, it could not have been opened in view of the Government Resolution dated 27th September 2018. As per clause No.2.5.2 (IV) in Volume 1 of the tender document, the

documents on the portal were accessible to one and all including the petitioner. Therefore, every corrigendum, notification issued was available on the website. He states that the deadline was extended for three times and lastly deadline was extended upto 5th March 2019. The two bids other than the petitioner were filed on 4th March 2019. He denies that the petitioner was not informed about the decision. In fact everything was available on the e-portal and there was no necessity for individual communication. He submits that the petitioner was not qualified and therefore, has indulged in the Petition.

6. Respondent No.4 has filed affidavit-in-reply and submitted that the extensions granted were within the knowledge of the petitioner. The last date that was extended for submitting the bid was upto 5th March 2019. Pursuant to the award of the project by order dated 18th May 2019, the work order was issued in favour of respondent No.4 on 15th July 2019 and an agreement was entered into between respondent No.4 and respondent No.2 on 26th February 2020. In view of the work order, respondent No.4 is permitted to install Unipole on Center Median on Divider. Though the Writ Petition appears to be filed in 2020, after

issuance of notices, the matter is moved for the first time in the month of November 2023. It shows that the petitioner is not interested in prosecuting the Writ Petition on *bona fide* grounds.

7. Heard learned Advocate Mr. Bayas for the petitioner, learned AGP Mr. Shirse for respondent No.1, learned Advocate Mr. Vaidya for respondent Nos.3 and 4 and learned Advocate Mr. Bora for respondent No.4. In order to cut short, we would like to say that the learned Advocates appearing on behalf of the respective parties have argued in support of their respective contentions.

8. In addition, learned Advocate for the petitioner, after taking us through the documents, submits that the extension for submission of bid has been illegally granted by respondent Nos.2 and 3 till 5th March 2019. In fact the extension was up-to 2nd March 2019 only. The acceptance of bid documents from respondent No.4 and another bidder on 4th March 2019 was illegal. He points out the rejoinder to the affidavit in reply filed by respondent Nos.2, 3 and 4 by the petitioner and takes us through the chart as to how the tender had progressed and how

respondent Nos.2 and 3 deviated from the main tender documents. He harped upon that respondent No.4 ought to have been granted contract of erection of bus shelter only, yet respondent No.4 is undertaking the work of Unipoles, which is in fact the tender given to the petitioner and for which the documents have been attached. He has also taken us through the notings on the file of the tender document and submits that in respect of noting dated 18th March 2019, later on insertions have been made in the handwriting. He has tried to take us through the voluminous tender documents regarding the conditions and eligibility criteria. He also relies on the order passed in *Jai Bholenath Constructions vs. the Chief Executive Officer, Zilla Parishad, Nanded and others in Civil Appeal No.4140 of 2022 by the Hon'ble Apex Court on 18th May 2022*, wherein it was observed that the High Court has misread the Judgment of *M/s. N.G. Projects Ltd. vs. M/s. Vinod Kumar Jain, 2022 (5) SCALE, 105* and held that when the manner in which the bid has been accepted shows arbitrary exercise of the powers then the interference by the High Court in its writ jurisdiction is permissible. Learned Advocate for the petitioner also relies on the decision in *Ramana Dayaram Shetty vs. the*

International Airport Authority of India and others, AIR, 1979 SC 1628, wherein it is held that if the requisite qualifications laid down are not fulfilled then the tender from such person cannot be accepted. The reliance on this authority was on the point which learned Advocate tries to demonstrate that respondent No.4 is not fulfilling the requisite criteria.

9. As regards the learned Advocates for respondents are concerned, they are also relying on *M/s. N.G. Projects Ltd. vs. M/s. Vinod Kumar Jain* (supra) and other decisions of the Hon'ble Apex Court, wherein restrictions on the judicial interference in tender matters was highlighted.

10. As aforesaid, the petition is on two counts, firstly to challenge the petitioner's own disqualification and secondly, to challenge the qualification of respondent No.4. We would like to rely on the observations from the recent decision by the Hon'ble Supreme Court in *M/s. N.G. Projects Limited (Supra)*, in which the earlier decisions have been taken note of and it has been observed that :-

"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision

over the decision of the employer as to whether or not to accept the bid of a tenderer. The court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a *mala fide* 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. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which they present-day Governments are expected to work."

11. We are aware of the decision in **Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517**, wherein Hon'ble Supreme Court has held that :-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality; unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice

or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

12. Thus, taking into consideration the well settled law on this point, we have limited scope. We have to see whether the petitioner has demonstrated firstly that the petitioner was eligible, as it had complied with all the tender requirements, then only we can go to the second aspect i.e. challenge by the petitioner to the decision of respondent Nos.2 and 3 to qualify respondent No.4 in the technical bid, otherwise the course is open to the petitioner as aforesaid in **M/s. N.G. Projects Limited (Supra)** and **Jagdish Mandal (Supra)**.

13. Thus, now we will turn to see whether the petitioner was justified in raising all these contentions. At the cost of repetition, it can be said that unless the petitioner shows his own eligibility to be considered, he cannot challenge the eligibility of respondent No.4, that too when the petitioner has allowed the

time to run against him. The first and foremost fact is about grant of extensions to submit the tender documents. As per the original advertisement, the last date for submission of tender documents was 14th February 2019. Even the petitioner himself had not filed the tender documents before 14th February 2019. As no tender document was received, the date of submission of tender was extended till 21st February 2019. Again the date was extended till 28th February 2019 and then the petitioner has submitted his tender documents on 26th February 2019. It appears that thereafter also two extensions were given. Even respondent Nos.2 and 3 are then relying on the Government Resolution dated 27th September 2018, which prescribes the procedure when a single tender is received. It prescribes that if a single tender is received, then without opening any envelope, it should be rejected and new tender should be floated. Now, when respondent No.3 had extended the time for submission of tender documents by communication on 1st March 2019, the petitioner has not challenged it within reasonable time, before this Court. Thereafter again there was an extension. According to the petitioner, it was till 2nd March 2019, however as per the

respondents, it was till 5th March 2019. Before opening of the tender, the petitioner has not approached this Court.

14. Thus, when the petitioner himself had filed his bid documents after two extensions and along with his documents he had given bid covering letter dated 20th February 2019, wherein at clause No.7.a) the petitioner has declared that he has examined and has no reservations to the RFP Documents, including any Addendum issued by the authority. Therefore, equity does not lie in favour of the petitioner to say that the further extensions were unjustified.

15. The basic requirement appears to have not been fulfilled by the petitioner. The tender document prescribes for the qualification criteria and the technical criteria prescribes that the bidder shall over the past seven financial years preceding the bid due date, had successfully completed at least three of eligible projects as specified in clause 3.1.2 costing not less than INR 1 Crore (rupees one crore). The experience certificate enclosed by the petitioner shows that the petitioner had carried out only one work, that too of Unipole Hoardings with respondent No.2 and

the document annexed was the work order. In the column of 'services provided, number of years of experience / revenue details' it is stated '12 years' but the said document is not produced in the present Petition. For whatever work the said work order is issued in favour of the petitioner, it appears to be of 'Unipole Hoardings'. As per bid term 3.2 i.e. 'Eligible Experience', term 3.2.1. stipulates, subject to the provisions of clause 3, the following experience would qualify as Technical Capacity and eligible experience in relation to eligible projects as stipulated in clause 3.3. Clause 3.2.1 further provides that, experience related to development of infrastructure projects which includes development of city bus shelters, development of city / central bus stand / terminal, foot over bridges, convention centers, road projects and other similar infrastructure projects etc., that qualify under clause 3.3; only completed projects experience shall be reckoned for computing eligible experience. Therefore, experience in civil work appears to be the need or qualification, which as per the experience certificate, which is issued by the petitioner himself to himself, is not fulfilling the criteria. When the petitioner is not fulfilling the said criteria /

qualification, we need not exercise our writ jurisdiction in his favour.

16. As regards the alleged work respondent No.4 is now doing i.e. he is also installing Unipole Hoardings, the petitioner is at liberty to have recourse to the legal permissible remedy and it is not the subject matter of the present Petition.

17. When the tender was floated from the Government portal, we presume that everything was visible and accessible to the petitioner. It is hard to believe that the petitioner would not have come to know about the status of rejection of his bid and it appears from Exhibit-F produced by the petitioner himself that the said status of rejection of his bid and acceptance of bid of respondent No.4 was uploaded at 4.16 p.m. on 9th May 2019. The petitioner has taken Exhibit-F, tender summary reports at 1.01 p.m. on 30th August 2019 and has filed the present Writ Petition on 27th January 2020. Therefore, the Petition also suffers from delay and laches.

18. Under the said circumstance, no case is made out to

interfere and exercise of powers of this Court under Article 226 of the Constitution of India. The Writ Petition, therefore, stands dismissed.

19. The Rules stands discharged.

20. In view of the dismissal of the Writ Petition itself, nothing survives for consideration in the Civil Application. Accordingly the Civil Application also stands disposed of.

[S.G. CHAPALGAONKAR]
JUDGE

[SMT. VIBHA KANKANWADI]
JUDGE

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