

VRJ

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

WRIT PETITION NO.10216 OF 2024

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Aditya Advertisers

Through Its Sole Proprietor

Smt. Varsha Deepak Pathak

... Petitioner

V/s.

Mira Bhayander Municipal Corporation

& Ors.

... Respondents

Ms. Deepali Bagla i/by Bagla & Associates for the
petitioner.

Mr. Narayan Bubna for respondent Nos.1 and 2.

**CORAM : DEVENDRA KUMAR UPADHYAYA, CJ &
AMIT BORKAR, J.**

DATED : JULY 29, 2024

ORAL ORDER.: (Per Amit Borkar, J.)

1. By invoking our jurisdiction under Article 226 of the Constitution of India, the petitioner, a sole proprietary firm carrying out business of advertising in the local limits of Mumbai, Navi Mumbai and Thane district, has challenged the tender document with a prayer to quash and set aside impugned tender of E-tendering for 9 years + 1 year (period for erecting advertisement media) on Build-Operate-Transfer (BOT) basis on municipal premises dated 26 March 2023, floated by respondent Nos.1 and 2. The petitioner has further

prayed for cancellation of tender No.2 and issuance of fresh tender for the same subject matter and a direction that corrigendum dated 2 November 2022 issued by respondent Nos.1 and 2 is barred in law.

2. Respondent No.1 through respondent No.2 floated a tender in respect of display advertisement by way of hoardings at total 90 places within the limits of Mira Bhayander Municipal Corporation. On 27 June 2022, the petitioner participated in the said tender and submitted requisite documents as stated in the tender document to respondent No.1 and 2 along with tender fee and EMD. In July 2022, the petitioner's technical and financial bid was accepted, admitted and the petitioner was declared as highest bidder eligible to be awarded the said tender. However, on 2 November 2022, respondent Nos.1 and 2 issued a corrigendum unilaterally cancelling said tender due to administrative issues.

3. On 23 March 2023, respondent No.1 through respondent No.2 issued a fresh tender for advertisement hoardings for 1113 hoardings of Build-Operate-Transfer (BOT) basis. According to the petitioner, the said tender was identical to the previous tender except in three conditions modified in order to oust petitioner from participating in the tender. On 13 April 2023, the petitioner along with other advertisement firms/companies addressed a letter to respondent No.1 requesting to relax certain modified conditions introduced by the said tender, according to the petitioner, it was unreasonable. However, respondent No.1 did not respond to

the said letter. On 20 October 2023, pursuant to an application under RTI, respondent No.1 provided all details in respect of Tender-1 and upon perusing the said documents, the petitioner came to know that under all 9 groups the petitioner's bid was highest and despite being successful, the petitioner was deprived of being awarded with the said tender. On 29 December 2023, the respondent No.1 informed the petitioner that Tender-1 for 90 advertising hoardings, the petitioner was the highest bidder and whose bid was accepted but since the tender was contrary to Maharashtra Municipal Corporation (Regulation and Control of Display of Sky-signs and Advertisement) Rules, 2022, the same had to be cancelled.

4. On 26 February 2024, respondent No.1 addressed a letter to the petitioner asking the petitioner to remove all the hoardings which were earlier permitted to be installed within seven days of the said letter. However, in March 2024, respondent Nos.1 and 2 permitted respondent No.3 to install disproportionate size of hoardings at the same places where, according to the petitioner, he had already installed its hoardings.

5. According to respondent No.1, fresh tender was floated on 23 March 2023, however, petitioner did not participate in the said tender process. On 15 December 2023, work order was issued in favour of respondent No.3. The petitioner filed Regular Civil Suit No.520 of 2023 in respect of the said tender process wherein initially ad-interim relief was granted; however, subsequently it was vacated. It is stated that in

February/March 2024, possession of hoarding site was taken over from the petitioner and handed over to respondent No.3. However, the petition is filed in May 2024.

6. Learned advocate for the petitioner submitted that the tender conditions in Tender-2 are tailor-made to favour respondent No.3. Entire process adopted by respondent Nos.1 and 2 in issuing impugned corrigendum cancelling the process of Tender-1 and, thereafter, floating impugned Tender-2 is arbitrary and perverse.

7. On the other hand, it is submitted on behalf of respondent Nos.1 and 2 that entire process of Tender-1 was cancelled due to administrative reasons. The process of fresh tender was initiated on 23 March 2023, however, the petitioner did not participate in the said tender. The last date for submission of tenders was 21 April 2023 and the tenders were to be opened on the same day or on 25 April 2023. On 15 December 2023, work order was issued in favour of respondent No.3. Possession of hoarding site was taken over from the petitioner and given to respondent No.3 in the month of February/March 2024. Therefore, no relief can be granted in favour of the petitioner.

8. The first and foremost question is as to whether the petitioner can be permitted to challenge the tender conditions at this stage. As per the tender Notice-2, last date for submission of tenders was 21 April 2023. The petitioner, admittedly, did not participate in the bid process and has challenged conditions of the tender by instituting the instant

writ petition, which was lodged only on 15 May 2024. In such circumstances, the petitioner ought to have been filed, challenging the impugned Tender-2 before the last date of submission of tenders, which was 21 April 2023.

9. A tenderer, who does not participate in the tender process, cannot be permitted to challenge the decisions of tender. Reference in this regard can be made to a judgment of the Supreme Court in the case of **National Highways Authority of India vs. Gwalior-Jhansi Expressway Limited**, reported in 2018 (8) SCC 243. The Supreme Court in paragraph 20 of the said case has held as under:

"20. *Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender notice can be allowed to make grievances about the non-fulfillment or breach of any of the terms and conditions of the concerned tender documents. The respondent who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions. At the culmination of the tender process, if the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever."*

10. In view of aforesaid facts and essentially keeping in view the fact that work order was issued to respondent No.3 on 15 March 2023 and the petitioner did not participate in the tender process, we decline to exercise our writ jurisdiction to entertain this writ petition.

11. The writ petition is, thus, dismissed. There shall be no order as to costs.

12. Interim application(s), if any, shall stand disposed of.

(AMIT BORKAR, J.)

(CHIEF JUSTICE)