IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.723 OF 2024

K. R. Constructions & Ors. ...Petitioners
Versus
The State Of Maharashtra & Ors. ...Respondents

Mr. Janak Dwarkadas, Senior Advocate a/w Ms Shilpi Jain i/b Zain A. K. Najam-Es-Sani for the Petitioners.
Mr. Manish Upadhye, AGP for Respondent No.1-State.
Mr. Ranjit Thorat, Senior Advocate a/w Ms Oorja Dhond i/b Ms Komal Punjabi for Respondent Nos.2 to 4 – BMC.

CORAM : ALOK ARADHE, CJ &
ARIF S. DOCTOR, J
DATED : 18th FEBRUARY 2025

Order : (Per Chief Justice)

1 Heard learned counsel for the parties.

2 Rule. Rule is made returnable forthwith. With the consent of the Learned Counsel for the parties heard finally.

3 In this Writ petition, the Petitioners inter alia seeks a writ of certiorari to quash and set aside the order dated 7th June 2023 passed by Municipal Commissioner, Municipal Corporation of Greater Mumbai (MCGM). The Petitioners seeks a direction to the Respondent Nos.2 to 4, their subordinate servants and agents to declare that both the tenders, i.e., E-Tender No.AW-252 and AE – 144, were issued as per the rates in USOR 2022/2023 and are exclusive of GST. The Petitioners also seeks a direction to the Respondent Nos.2 to 4 to treat the bids submitted by the Petitioners as excluding GST and accordingly revise draft letter dated 21st March 2023 for AW-252 and

for AE-144 and on issue of clarification that draft letters issued by the Petitioners are exclusive of GST and GST be paid to petitioners separately at prevailing rate. In order to appreciate the grievance of the Petitioners, the relevant facts need mention which are stated infra.

4 The Petitioner No.1 is a partnership firm, registered under the Indian Partnership Act, 1932. The Petitioner No. 1 is a civil contractor registered with the MCGM in Class AA for the last 27 years and has undertaken multiple projects. Petitioner No.2 is a company incorporated under the Companies Act, which is engaged in civil works pertaining to roads, sewage works etc. and is registered as a civil contractor with the MCGM. The Petitioner No.3 is a public limited company.

5 The MCGM issued two identical e-tenders on 10th February 2023 for preventive maintenance works on Western Express Highway called as AW 252 and Eastern Express Highway called as AE 144. The estimated cost in AW 252 was Rs.1,42,96,14,916.62 and AE 144 – Rs.93,04,70,635/-. The Petitioners in response to the e-tenders submitted their bids on 20th February 2023 for bid works excluding GST. In the aforesaid two tenders, two contradictory clauses were mentioned with regard to GST. Clause 10.111 of Section 10 of the E-tender, i.e., AW 252 provided that the bills of quantities shall be exclusive of GST, whereas clause 10.33 of the tender document mentions the bills of quantities shall be inclusive of GST.

6 On 8th March 2023, the Packet C for financial bid was opened for both the e-tenders and the Petitioners were declared as the lowest bidders in both

the e-tenders. The Percentage quoted by the petitioners in Eastern Express Highway (AE 144) bid was 21.21% lower whereas in respect of the Western Express Highway the same was 27.54% lower than the estimated bid price.

7 On 8th March 2023, itself the MCGM requested the petitioners to submit detailed rate analysis. The Petitioners on 9th March 2023, vide emails provided detailed rate analysis categorically stating that the rates quoted are excluding GST. After the submission of the rate analysis, the officials of the MCGM orally informed the Petitioners that both the e-tenders which were issued to invite quotes from the bidders excluding GST, and there has been an inadvertent error whereby one of the conditions in clause 10.33 which bears the heading "Tax" and which states that the tenderer shall quote rates inclusive of GST remained unchanged due to the oversight. On 17th March 2023 and 19th March 2023, the Petitioners clarified that all the rates quoted by the Petitioners are as per USOR 2023 and are exclusive of GST. It was pointed out by the Petitioners that the rates quoted by them are very competitive rates and if the GST is included then the bids of the Petitioners would become financially unviable.

8 The Chief Engineer (Roads & Traffic) issued two work orders on 3rd April 2023 in respect of both the e-tenders inclusive of all percentages without any mention as to GST in the work orders. The Petitioners accepted the aforesaid two work orders and stated that they are willing to commence the work without prejudice to their claim about GST. The Petitioners also pointed out in the communication addressed to the Respondent No.3 that

clause 10.33 was an inadvertent error and the MCGM was called upon to issue a clarification. However, no clarification was issued.

9 The Petitioners on 18th April 2023 filed a Writ Petition namely Writ Petition (L) No.10992 of 2023 inter alia seeking a direction that the rates in both the e-tenders were exclusive of GST. The Petitioners also sought direction to the MCGM to either revise the two work orders or to issue a clarification that the work orders were issued excluding the GST. The Division Bench of this Court by order dated 20th April 2023 disposed of the said petition. The relevant extract of the order is extracted below for the ready reference :

> *"11. Having perused the tender conditions and the documents in question, in the facts and circumstances of the case, it may not be possible for us to consider the prayers as made in the petition and grant any reliefs as prayed for, more particularly, when the reliefs are touching the tender conditions on the basis of which the petitioners and other bidders had submitted their bids*
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> *12. However, in the peculiar facts of the case, we are of the opinion that the controversy needs to be resolved by the Municipal Commissioner. The work orders for the work in question have already been issued. The parties are also ad idem that the work under the contract has commenced and the work is required to be carried out with all expediency.*
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> *13. We accordingly dispose of the petition directing the Municipal Commissioner to hear the petitioners on all these issues, and after considering all the documents in relation to the tenders in question, which are part of the record, take an appropriate reasoned decision in accordance with law as to whether the petitioners' plea of an entitlement on exclusion of the GST is acceptable.*
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> *14. The petitioners shall appear before the Municipal Corporation on 25 April 2023 at 2.30 p.m. Let such*

decision be taken within a period of two weeks from 25 April 2023. All contentions of the parties are expressly kept open.

15. We permit the Municipal Commissioner to treat the present petition as also the documents annexed to the petition, as a representation of the petitioners."

10 It is pertinent to mention that the MCGM after the aforesaid order was passed, sought an opinion from the Former Chief Justice of Allahabad High Court *inter alia;* with the following query:-

"Whether the Petitioners are Eligible for separate GST payments at prevailing rates, over and above the original financial offer in respect of Subject tenders i.e, E-Tenders Nos. W-252 and AE-144."

The Former Chief Justice of Allahabad High Court opined as follows: -

"For the reasons set out above, I answer Query 2.1 as follows: Upon interpretation of the tender documents in accordance with well settled legal principles, it is clear that the purport of the tender documents was to invite bids exclusive of GST. The Petitioners are therefore entitled to GST payment over and above their financial bid amounts."

11 The Commissioner of the MCGM by an order dated 7th June 2023 in pursuance of the directions issued by the Division Bench of this Court, rejected the claim of the petitioners by disregarding the opinion of the Former Chief Justice of the Allahabad High Court. The relevant extract of the order is extracted below for the ready reference :

"I have considered the representation as well as the submissions of the Applicants/Petitioners and the opinion of Retired Chief Justice of High Court. Retired Chief Justice of High Court has opined that Petitioners are entitled to GST payments over and above their financial bid amounts. However, I tend to disagree with his opinion on the

following grounds :

1. As large amount of money is involved it will not be appropriate to take a lenient decision, irrespective of the merits of the case, by allowing the representation of the petitioner which may set a wrong precedent and open petitions from other Contractors with similar demands.

2. An administrative decision is already taken as Commissioner and Administrator of B.M.C and work order, stands issued therefore it will not be prudent to review the said decision again at the level of same authority.

3. Considering the cannons of financial propriety, it would not be appropriate to consider the representation of the petitioner at this stage when work order is already awarded.

4. After the work order is issued, agitating the issue on GST payment after acceptance of work order is questionable.

Considering all the above facts, the request of petitioner for separate GST payment is rejected."

12 In the aforesaid factual matrix the petitioners have approached this Court seeking the reliefs as stated supra.

13 The Learned Senior Counsel for the Petitioners has submitted that the MCGM had sought legal opinion from Former Chief Justice of Allahabad High Court, who had opined that the purport of the tender documents was to invite bids exclusive of GST and that the Petitioners would be entitled to GST payment over and above their financial offer. However, it is contended that the impugned order passed by the Commissioner of the MCGM suffers from non-application of mind as he has failed to assign any reason to discard the opinion sought for by the Corporation itself. It is further submitted that the impugned order has been based on irrelevant and

extraneous consideration. Therefore, the same cannot be sustained in the eye of law.

14 On the other hand, the Learned Senior Counsel for the MCGM has supported the order passed by the Commissioner and has submitted that it is open to the authority to interpret the terms and conditions of the notice inviting tender and no interference is called for in exercise of powers of judicial review in this writ petition.

15 We have considered the rival submissions made by both sides and perused the record. It is trite law that State and its instrumentalities are enjoined with the obligation to act with fairness even in contractual field and has to arrive at a decision by taking relevant materials. It is not open for an authority to take into account irrelevant or extraneous consideration. In case the decision is arrived at on irrelevant and extraneous consideration, the same is liable to be quashed and set aside in exercise of powers of judicial review. The terms and conditions at the first instance are required to be interpreted by the authority which has issued the notice inviting tender. In the instant case, in the earlier round of litigation also, it was admitted on behalf of the MCGM that there was some ambiguity with regard to the tender conditions and it was also not disputed by the MCGM that the documents of the MCGM indicate that the schedule of rates 2022-2023 would became applicable. Admittedly, the MCGM in order to resolve the ambiguity in the tender conditions had sought the opinion of Former Chief Justice of Allahabad High Court, who in his opinion clearly stated that the

purport of the tender documents was to invite bids exclusive of GST and the Petitioners are therefore entitled to GST payment over and above their financial bid amounts. The Commissioner of the MCGM though referred to the opinion tendered by the Former Chief Justice of Allahabad High Court, however, has disagreed with the same on the following grounds:

> (i) A Large amount of money is involved and it is not appropriate to take a lenient decision.
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> (ii) The administrative decision has already been taken by the Commissioner and the work order has been issued. Therefore, it is not prudent to review the decision again.
>
> (iii) Considering the cannons of financial propriety, it would not be appropriate to consider the representation of the petitioner at this stage when work order is already awarded.

16 In our considered opinion, the aforesaid reasons assigned by the Commissioner are wholly extraneous and irrelevant in interpreting the terms and conditions of the contract. No reasons have been mentioned in the order for disregarding the opinion sought from the Former Chief Justice of Allahabad High Court. The order is cryptic and cavalier in nature and suffers from vice of non application of mind. The impugned order cannot be sustained in the eye of law. The impugned order, therefore, cannot be sustained in the eye of law and therefore, it is quashed and set aside.

17 The Commissioner of MCGM is directed to decide the claim of the petitioners that their bids are exclusive of GST and to revise the draft letter dated 21st March 2023 for AW-252 and for AE – 144, afresh. The Commissioner shall intimate the petitioners about the time and date of hearing which may be in the course of next week. On the receipt of notice, the petitioners' authorized representative shall appear before the Commissioner. The Commissioner shall, thereupon, shall afford an opportunity of hearing to the authorized representative of the petitioner and shall decide the claim of the petitioners whether their financial bids are exclusive or inclusive of GST. Needless to state that the Commissioner shall bear in mind the opinion given by the Former Chief Justice of Allahabad High Court with regard to the scope of tender document and shall decide the claim of the petitioners by a speaking order.

18 Let the aforesaid exercise be completed within a period of two weeks from the date of appearance of the Petitioners. It is clarified that all contentions of the parties are kept open to be urged before the Commissioner of the MCGM.

19 Rule is accordingly made absolute in the aforesaid terms. The Writ Petition is disposed of.

(ARIF S. DOCTOR J.) **(CHIEF JUSTICE)**