

(2019) 04 BOM CK 0049
In the Bombay High Court
Case No : Writ Petition (L) No. 3757 Of 2018

Hanwant Singh J. Ranavat		APPELLANT
	Vs	
Municipal Corporation And Ors		RESPONDENT

Date of Decision : 08-04-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 04 BOM CK 0049

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : S.U. Kamdar, Birendra Saraf, Chirag Kamdar, Bipin Joshi, Prayag Joshi, Rajiv Chavan, Priyanka Chavan, Sumangala Yadav, Neelam Kaintura, Vandana Mahadik, Milind Sathe, Simil Purohit, Faran Khan, Suraj

Final Decision : Dismissed

Judgement

S.C.Dharmadhikari, J

1. We have heard both sides.
2. Rule. Respondents waive service. By consent, Rule is made returnable forthwith.
3. By this writ petition under Article 226 of the Constitution of India, the petitioner, who is carrying on business as Government Civil Contractor under the name and style "M/S Jain Construction Company", has challenged the decision of the Municipal Corporation of Greater Mumbai (For short, "MCGM") and particularly, its interpretation of the E-tender notice dated 26 th September, 2018, copy of which is at Exhibit 'A' of the paper-book.
4. The relief claimed in terms of prayer clause (a) of this writ petition reads as under:-

"(a) this Honourable Court be pleased to issue Writ of Certiorari or Writ in the nature of Certiorari, or such other writ, directions, orders be passed, calling upon

the Respondents to produce records and proceedings of E tender notice dated 26.09.2018 at Exhibit A annexed hereto, bearing No. NO.CHE/6464/BRIDGES UNDER BID NO.7100133964 FOR THE WORKS OF MINOR REPAIRS TO THE EXISTING BRIDGE IN G/NORTH WARD OF CITY DIVISION N, and after perusing the same and after going through the validity, legality and propriety thereof, this Honourable Court be pleased to direct the Respondents to disqualify HMV Associates and complete the tender process in accordance with law."

5. The few facts necessary to understand the controversy are as follows.

6. The Municipal Corporation of Greater Mumbai, the first respondent to this writ petition, through its Chief Engineer (Bridges) City North had invited the bids. The petitioner claims that he is reputed Government Contractor. He has experience of last fifteen years of having undertaken and successfully completed works of building and road repairs for Municipal Corporations as also Government and Semi Government organisation. The petitioner says that he has carried out such work also for the second respondent.

7. The Municipal Corporation has designated different classes of contractors and as stipulated in para 5, running pages 3 and 4 of the paper-book.

8. It is claimed that the Chief Engineer (Bridges) invited tenders for works of minor repairs to the existing bridges in G North Ward of City Division II. A copy of this tender notice is at Exhibit 'A' to the petition. It is stated that the bid document comprises of several sections. In terms of the procedure, for submission of bid, the petitioner submitted packets 'A' and 'B' within stipulated time i.e. on or before 11th October, 2018. The 'A' and 'B' packets were opened on 12th October, 2018. The 'C' packet was to be opened on 23rd October, 2018, but that was postponed. The petitioner in paras 11 to 13 of this writ petition urges as under:-

"11. The scrutiny report of A, B packets was prepared by the Executive Engineer (Bridges) City N on 25.10.2018. Hereto annexed and marked as Exhibit "G" is the copy of the scrutiny report dated 25.10.2018. The scrutiny report reveals that A and B packets were opened on Line on 12.10.2018. 3 Bidders participated which include the Petitioner and HMV Associates as well as New India Construction Company. During the scrutiny, it is revealed that the Petitioner and New India Construction Company, complied with the requisitions for the submission of A and B packets. It is revealed that the bidder, HMV Associates, was not registered contractor either with Municipal Corporation of Greater Mumbai or any government or semi government authorities. HMV Associates misrepresented that they are registered with PWD. During the scrutiny it was confirmed that HMV Associates is not registered with PWD. The scrutiny report further refers to instance of one Sai Project who have been awarded the work though not registered with any government or semi Government or Municipal corporation of Greater Mumbai authorities. The Executive Engineer (Bridges) sought approval of higher authorities for holding HMV Associates as eligible

contractors, despite they being not registered contractor with Government, semi Government or with MCGM authorities and despite false representation to the effect that HMV Associates is registered with PWD.

12. The recommendation is also on the basis of interpretation of the eligibility criteria which is mentioned in E tender notice as well as Section VI which is reproduced hereinabove.

13. It is respectfully submitted that it has been consistent practice of the Corporation to invite tenders from Government, semi government, registered contractors and not from private unregistered contractors. The registration with MCGM is additional and mandatory requirement which can be rectified within 3 months. There cannot be any intention of inviting and private or individual contractor, who are not registered with anybody. The term "contractors of repute" does not and cannot include HMV Associates, who have misrepresented themselves as PWD contractors. Any private or proprietary unregistered firm cannot be said to be eligible to participate in the bid. The registration with any Government or semi Government authorities requires a prescribed norms as to the quantum of work carried out, financial capacity, paraphernalia and other aspects. It is submitted that if the eligibility criteria is lift open to any private contractor without scrutiny of their credibility, will frustrate the purpose of registration of the contractor with Government and semi Government authorities. Such interpretation or clause inviting tenders is contrary to the Standard Bid Document. The petitioners crave leave to refer to and rely upon the Standard Bid Document, when produced."

9. Thereafter in para 14 it is urged that the modus operandi of respondent Nos.1 and 2 was clear. That it decided to award the contract to the added respondent No.3 although it was blacklisted for four years and it is to the knowledge of everybody concerned. This fact is suppressed. Further, the third respondent is not a registered contractor. In the grounds of this petition, the petitioner says that there is an eligibility criteria prescribed and no deviation or departure therefrom is permissible. Article 14 of the Constitution of India mandates that every Government action, including in the realm of contract, should be fair, just, reasonable, non arbitrary and non discriminatory. The Municipal Corporation being a public body should ensure quality product or service and, therefore, permit a wide range of participation. It cannot exclude people, who are otherwise eligible nor it can include the people who do not fulfill the eligibility criteria. In the present case, the understanding of the Municipal Corporation and the general body as a whole throughout is that no unregistered contractor qualifies and yet such person having been allowed to bid, the present petition with the above averments, has been filed.

10. When this petition was placed before a Division Bench of this Court, on initial occasion, namely, 2nd November, 2018, the petitioner sought leave to amend the petition. The petitioner sought leave to move the petition during the Diwali Vacation and on 21st November, 2018 when it was listed, the Bench before which

it was listed, passed the following order:-

"1. Having heard learned counsel for the respective parties, we direct the Respondent Nos.1 and 2 to file an affidavit-in-reply, before the returnable date and a copy thereof be served on the other side.

2. Till the returnable date, the tender shall not be awarded to the Respondent No.3.

3. Stand over to 5th December, 2018.

4. To be heard alongwith Writ Petition (L) No.3905 of 2018."

11. The petition filed by another person, namely, Writ Petition (L) No.3905 of 2018 was also circulated with this petition. The petitioner therein has prayed for continuation of the earlier ad-interim order, but from the record, it is found that though the ad-interim order has been continued till date, for one or the other reason, the writ petition could not be taken up.

12. In the additional affidavit of the petitioner, he states that the final bid comparison report for E-tender uploaded by respondent Nos.1 and 2 on their official website would demonstrate that they have opened 'C' packet of the impugned E-tender process, contrary to the requests so made, with apparent malafide intentions and that is to allot the work to respondent No.3. In the additional affidavit, reliance is placed on a pre-bid meeting which was held on 16th November, 2018. There, a query was raised as to whether any contractor, not registered with MCGM or Central Government, Semi Government, can participate or otherwise and the clarification given was, such a contractor will not be allowed to participate. Exhibit 'B' to the additional affidavit of the petitioner encloses a copy of the minutes of the pre-bid meeting dated 16th November, 2018. With this understanding, respondent No.3 could have never qualified for the bid work. It is in these circumstances that the decision holding the third respondent to be eligible and thereafter to consider its bid and to award the contract work to him suffers from serious legal infirmity and illegality.

13. On 7th December, 2018, there is an affidavit in reply filed by the MCGM to this petition and the relevant portion of this affidavit reads as under :-

"A plain reading of the above notice lays down three categories of contractors eligible to participate in the tender process.

a) Firstly Contractors of repute, multidisciplinary engineering organizations, proprietary/partnership firms/private limited companies/public limited companies/companies registered under the Indian Companies Act, 2013;

b) Secondly the contractors registered with the Municipal Corporation of Greater Mumbai (MCGM) in class I(C) and above as per new registration.

c) Thirdly the contractors/firms equivalent and superior classes registered in

central or state govt/semi govt organization/central or state govt undertakings.

Subject to the condition that the contractors who are not registered with MCGM will have to apply for registering their firm within three months time period from the award of contract, otherwise their bid security i.e. EMD (earnest money deposit) will be forfeited/recovered and an amount equal to registration fee of respective class will be recovered as penalty."

14. Mr.Kamdar, learned senior counsel appearing on behalf of the petitioner would submit that the petitioner is a registered contractor. The petitioner's bid was the second lowest. The third respondent-unregistered contractor entered the fray and claimed to be the lowest bidder. Mr.Kamdar has taken us through the E-tender notice and particularly, the relevant portion thereof at page 18 of the paper-book. He urged that the Municipal Corporation has not allowed anybody, who is unregistered, to participate in the tender process. The third respondent is neither registered with the Mumbai Municipal Corporation nor is possessed with any registration either from the State or Central Government or from the Central Government agencies. The Municipal Corporation is now deviating or departing from its interpretation of the tender conditions and allowing the third respondent to participate in the tender process by concluding that the said third respondent can participate under the category or class "contractor with repute". Mr.Kamdar has taken us through pages 35 and 42 of the paper-book to urge that insofar as the requirement of valid registration certificate, that is understood by the Municipal Corporation to mean that anybody who is not registered with the Municipal Corporation or does not fulfill the requirement of registration with the Central Government as stipulated in the notice is not eligible. Now, departing from this clear understanding and interpretation and though M/S HMV Associates is not registered with PWD authorities as well, it is allowed to participate and its bid is held to be responsive.

15. Mr.Kamdar has invited our attention to several decisions of the Hon'ble Supreme Court in the field and to the effect that if a bidding process is arbitrary and an interpretation or understanding of a tender notice is ex-facie unreasonable or perverse, then, it is open to judicial review. The decisions, therefore, to this effect, having been relied upon by Mr.Kamdar, he has taken us through the affidavit in rejoinder of the petitioner. In that affidavit in rejoinder, the petitioner has made a statement and to the effect that a similar notice issued in respect of several contracts has been interpreted by the Municipal Corporation and its officials to mean that unregistered contractors cannot participate in the bidding process. The attention of this Court is invited to page 84 of the affidavit in rejoinder in support of this argument. Further, our attention is also invited to the Municipal Corporation's clarification, which appears at page 68 of the paper-book. There, the Director (Engineering Services and Project) has, with reference to the Municipal Commissioner's order dated 5th November, 2018, pointed out that the P.W.D. has now stopped registration of contractors from 21st August, 2017 for more than Rs.1.5 crore works. Now there is only one category for

registration, that is upto Rs.1.5 crore. Such a proposal was submitted for consideration of the Municipal Commissioner and it was approved by him. That was directed to be noted. Mr.Kamdar, therefore, would submit that throughout, the understanding of the Commissioner and the Municipal Corporation is that the notice bars participation of unregistered contractors. Mr.Kamdar submits that once the third respondent is an unregistered contractor, then, this condition has been relaxed in its favour although that contractor was first debarred from participating in the process by the Municipal Corporation itself. Hence, the impugned action is arbitrary and discriminatory as well.

16. Mr.Rajiv Chavan, learned senior counsel appearing on behalf of the Municipal Corporation would submit that the Municipal Corporation has never categorised the contractors under one category and, namely, registered contractors. If that is the understanding and interpretation of the tender notice, then, all prior and subsequent phrases and words would be rendered meaningless. He would submit that every such stipulation should be interpreted consistent with the intent and object sought to be achieved. The object sought to be achieved and particularly, while undertaking repairs to the bridges and roads in a city like Mumbai is that a participant or bidder, who has a capacity to provide quality work and services, should be selected. The registration can never be a criteria to exclude the bidder, who is otherwise eligible or qualified. Ultimately, this is a public bid and it is competitive process. One who has fulfilled the relevant criteria and has a capacity to render quality service would be necessarily chosen. Therefore, the understanding throughout has been in terms of the explanation provided in the affidavit in reply of the Municipal Corporation. Any contrary interpretation and placed by the petitioner must, therefore, be rejected. This is not a case where the powers of judicial review would enable this Court to interfere with the interpretation of the subject clause/ stipulation in the E-tender notice, by the Municipal Corporation.

17. Mr.Sathe, learned senior counsel appearing on behalf of the third respondent has supported Mr.Chavan and has urged that on no occasion, the Municipal Corporation has given an impression to the bidders or the contractors that if they are not registered with the Municipal Corporation or the Government, they cannot apply. In such circumstances, he would also submit that the writ petition be dismissed.

18. For properly appreciating the rival contentions, we must at once notice that the Municipal Corporation floated the E-tender notice dated 26th September, 2018 because it undertook the works of minor repairs to the existing bridges in G North Ward of City Division II. The relevant part of the tender notice reads thus:-

"The Municipal Corporation of Greater Mumbai (MCGM) invites e-tender to appoint Contractor for the aforementioned work from contractors of repute, multidisciplinary engineering organizations i.e. eminent firm, Proprietary/ Partnership Firms/ Private Limited Companies/ Public Limited Companies/ Companies registered under the Indian Companies' Act 2013, the contractors

registered with the Municipal Corporation of Greater Mumbai (MCGM) in Class I(C) and above as per new registration and from the contractors/firms equivalent and superior classes registered in Central or State Government/Semi Govt. Organization/Central or State Public Sector Undertakings, will be allowed subject to condition that, the contractors who are not registered with MCGM will have to apply for registering their firm within three months' time period from the award of contract, otherwise their Bid Security i.e. E.M.D. (Earnest Money Deposit) will be forfeited/recovered and an amount equal to Registration Fee of respective class will be recovered as penalty."

19. A bare perusal of this relevant para denotes that the Municipal Corporation of Greater Mumbai invites E-tender to appoint Contractor for the aforementioned work. The E-tender bids are invited from contractors of repute, multidisciplinary engineering organisations, namely, eminent Firms, Proprietary/Partnership Firms, Private Limited Companies, Public Limited Companies/Companies registered under the Indian Companies Act, 2013 and registered with the Municipal Corporation of Greater Mumbai in Class I(C) and above as per new registration and from the contractors/Firms equivalent and superior classes registered in Central or State Government etc. The contractors who are not registered with the MCGM will be allowed to participate subject to condition that if the work is allotted or awarded to them, they will have to apply for registration within three months from the date of such award.

20. This paragraph/portion of the tender notice cannot be read as suggested by Mr.Kamdar. That is for more than one reason. If quality of the work is the focal point as basic amenities are to be provided to general public, then, lasting and durable work of repairs can only be carried out by contractors of repute. The other participants can be multidisciplinary engineering organisations, namely, Firms and other players of eminence, contractors registered with Municipal Corporation and contractors registered with Central Government or State Government/ Semi Government, Central or State Public Sector Undertakings. The participation is not restricted only to registered contractors. However, there is a stipulation that on award of contract, the successful unregistered contractors will have to apply for registering the Firm within a period of three months from the date of award of the contract, otherwise, their Bid Security/Earnest Money Deposit will be forfeited/ recovered and the amount equivalent to Registration Fee will be recovered as penalty.

21. If the participation is restricted only to registered municipal contractors, then, it is futile or unnecessary to insert the condition that unregistered contractors or those contractors who are not registered with MCGM will have to apply for registering their Firms within a period of three months from the date of award of contract. Thus, such of the contractors who do not possess either a municipal registration or registration from the Central Government or State Government or Semi Government organisation or Central or State Public Undertakings, will have to seek the registration post award of the contract, within

a period of three months from the date thereof. The Municipal Corporation, bearing in mind the nature of the work, namely, minor repairs to the existing bridges, did not rule out the participation of such contractors who are not registered with Municipal Corporation or the Central or the State Government etc.

22. The eligibility criteria appears in Section 2 of the bid document and therein, at page 23, there is a requirement stipulated of Technical and Financial capacity. That will have to be satisfied by all bidders. The E-tender Online process at page 26 and the portion highlighted therein at page 27, according to Mr.Kamdar, clearly suggests that the contractor can register his interest to participate, but in the next sentence it is stated that without registration one cannot quote for the Bid/Tender. According to Mr.Kamdar, this understanding of the Municipal Corporation is contrary to what is now placed before this Court in the affidavit in reply.

23. We are unable to agree and for an additional reason. Therein, the clause pertains to Contractors' Bidding. The applicant will quote and upload the tender document. The process is that he will have to access E-tender link of SRM portal. He will have to log in with User ID and Password. He must select desired Bid Invitation he wants to bid. Then he will have to download the document and for that the contractor will have to pay online Tender Fee. The contractor can register his interest to participate and without registration, one cannot quote for the Bid/Tender. That is not to be equated with the registration number as municipal contractor.

24. Further, we perused page 30 of the paper-book which is "instructions to applicants". From page 30 to running page 35 are the details and thereafter, there is a heading "submission of tenders" particularly in relation to Packet 'A'. There as well, the valid registration certificate and which registration certificate is referable to the registration for the purpose of filling up the E- tender form, is contemplated. The petitioner then has invited our attention to page 42 of the paper-book. There, what the Municipal Corporation attempted to do was to deal with the complaints and in relation to consideration of bids of the third respondent before us. The scrutiny of the bids was completed insofar as packets 'A' and 'B' and the shortfalls were noted. A summary report was prepared. As far as M/S HMV Associates is concerned, it is clarified that all required documents in packets 'A' and 'B' are submitted by the Bidder before the scheduled date. The Bidder fulfills the technical and financial bid requirement/capacity. However, this Bidder is not registered with MCGM and there was certain de-registration period, which came to be reconciled. It is not even registered as Government/Semi Government/Public Sector Undertakings contractor. The Bidder has submitted a letter stating that if found lowest and otherwise eligible, it will get itself registered with MCGM within a period of three months. It has also highlighted this aspect and has stated that because a limited requirement of registration is prescribed by PWD and that is in relation to contract worth Rs.1.5 crore, it is also not registered with PWD. The Executive Engineer (Bridges) says that with all this,

the bid of the third respondent is responsive and it must fulfill the condition, in the event the work is allotted.

25. What we have found from the additional affidavit and equally the rejoinder affidavit of the petitioner before us is that the petitioner highlights a communication to "M/S India Engineers". There, the standard bid document contained more or less similar stipulations. However, there the company who placed its bid, namely, M/S India Engineers, was not insisting upon a registration, but seeking a clarification and it was informed that it can participate with registration with Government organisation. Then, the clarification was that any company who wishes to participate should not have been debarred or blacklisted by the MCGM or any other Government organisation. It is very clear from this aspect that what the petitioner is seeking to highlight is specific clarification in relation to matters which are not raised before us. In the present case, a contractor who is not registered with MCGM or Central Government/State Government/Semi Government etc. will not be allowed to participate was a clarification given to the bidder-"M/S Sahyog and Co." That clarification was on the query as to whether the contractor who is not registered with MCGM and also not registered with Government/Semi Government is allowed to participate in said tender or another tender or not.

26. We can safely ignore this aberration on the part of the Municipal Corporation and its shift only because of an affidavit filed before us. It is clarified by the Municipal Corporation that its understanding is that there are categories or classes of contractors, who can bid. A public body will never rule out a participation by contractors of repute and would not restrict the competition only between the registered contractors.

27. It is this understanding of the Municipal Corporation which we found to be consistent with the wording of the E-tender notice. In fact, the E-tender notice will have to be read as set out in the affidavit itself. It is apparent that the stipulation appearing at page 18 of the paper-book would clarify this aspect further. To our mind, the classes of contractors, including the contractors of repute are not excluded merely because they are neither registered with the Municipal Corporation or with the Central/State Government. All that such contractors of repute and multidisciplinary engineering organisations, if not registered, would have to satisfy is a condition that post awarding of contract in their favour, within three months, they must seek registration with the Municipal Corporation. To our mind, this stipulation, as understood by the Municipal Corporation, sub-serves the larger public interest. Eventually such registered contractors, if not found to have completed the contract work satisfactorily or have abandoned it should be then properly penalised, including with blacklisting. A debarring or blacklisting by the Municipal Corporation would definitely have a bearing on the contractor's standing and reputation in the market. He may then be excluded from participation by others as well. In the circumstances, we do not think that the interpretation of the E-tender notice is either arbitrary, perverse or

malafide. In fact, the interpretation is consistent and should be therefore upheld. In the circumstances, it is not a fit case where our power of judicial review should be exercised to issue any prerogative writ directing the Municipal Corporation to exclude the third respondent from the bid process. Moreso, when the petitioner participated in the process concluded till date. It did not withdraw even after its complaint was not accepted. Having taken a chance, now the petitioner cannot turnaround and challenge the interpretation placed by the MCGM on the E-tender notice.

28. Consequently, the writ petition fails. Rule is discharged. There will be no order as to costs.

29. At this stage, Mr.Kamdar, learned senior counsel appearing for the petitioner would pray for continuation of the ad-interim order for a period of one week from the date this order or copy thereof is made known or available to the petitioner.

30. This request is opposed by Mr.Chavan and he submits that from November, 2018 and to be precise, from 21st November, 2018, the Municipal Corporation has been restrained from issuing the work order. Mr.Chavan would submit that the condition of bridges is deteriorating and if the repairs, even of minor nature, are not carried out urgently, the bridges would deteriorate further.

31. On hearing both sides on this limited point, we are of the view that larger public interest demands that we should not continue the ad-interim order any further, particularly when we have upheld the interpretation of the clause in E-tender notice placed thereon by the Municipal Corporation and dismissed the writ petition. The request in that behalf is, therefore, refused.