
(2012) 05 BOM CK 0026
In the Bombay High Court
Case No : Writ Petition No. 3754 of 2012

M/s. Monarch Infrastructure Pvt. Ltd.	APPELLANT
Vs	
Ulhas Nagar Municipal Corporation and Another	RESPONDENT

Date of Decision : 10-05-2012

Acts Referred:

Bombay Provincial Municipal Corporations Act, 1949 — Section 73
Bombay Provincial Municipal Corporations Rules, 1949 — Rule 2
Constitution of India, 1950 — Article 14, 226

Citation : (2012) 4 BomCR 670 : (2012) 114 BOMLR 2101

Hon'ble Judges : S.S. Shinde, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Arif Bookwala and Mr. Sunil Manohar, with Mr. Devendra Chauhan with Mr. Filji Frederick instructed by M/s. FF and Associates, for the Appellant; A.A. Kumbhakoni with Mr. S.M. Kamble for Respondent No. 1 and Mr. P.K. Dhakephalkar, with Mr. L.M. Acharya, for the Respondent

Judgement

1 Heard Learned Counsel for the parties. Rule. Rule made returnable forthwith, by consent. Mr. Kumbhakoni, Learned Counsel waives notice for respondent No. 1. Mr. Dhakephalkar, learned Senior Counsel wavier notice on behalf of respondent No. 2. By consent, matter proceeded for final disposal forthwith.

2. This writ petition under Article 226 of the Constitution of India takes exception to the General Body Minutes of the meeting dated 18th April, 2012, (Exhibit-G to the petition) appointing the second respondent as its octroi agent. A declaration is also sought that the action of the first respondent in appointing second respondent as Octroi Collecting Agent is contrary to the provisions of Bombay Provincial Municipal Corporations Act, 1949 and the law governing field of distribution of state largesse.

3. The broad undisputed facts which have led to the filing of the present petition are as under :

The Corporation invited tenders for appointing agent to collect octroi duty for the

period from 1st April, 2012 to 31st March, 2013 by issuing public notice dated 24th February, 2012. The tenders of all the bidders were opened on 27th March, 2012. Before the final decision could be taken, the Corporation received instructions from the Urban Development Department, Government of Maharashtra, dated 26th March, 2012 to apply Local Body Tax with effect from 1st April, 2012. The concept of the Local Body Tax is totally different from the concept of octroi collection. As a result of these instructions, the tender process was suspended. Consequent to that decision of the Corporation, the petitioner sent letter to the Corporation requesting for 24 hour notice if the tender process was to be restarted. The Corporation implemented the Local Body Tax with effect from 1st April, 2012. However, in view of absence of staff trained in applying Local Body Tax, which was completely a different regime of recovery of tax, as compared to octroi, the Corporation was unable to recover even a single rupee. The Corporation, therefore, made representation to the Government of Maharashtra to defer the applicability of the Local Body Tax for a few months so that in the meantime, the Corporation would be able to train its employees/staff for its application. The petitioner then sent offer letter to act as an agent for a period of three months or more dated 17th April, 2012 without specifying any amount therein. On 17th April, 2012, pursuant to the request made by the Corporation, corrigendum was issued by the Government of Maharashtra of applying the Local Body Tax from 1st July, 2012 instead of 1st April, 2012. Since the agreement with respondent No. 2 to act as an agent to collect octroi had already expired, the Corporation started collecting the octroi departmentally. On 18th April, 2012, it could collect only Rs. 16.70 lakhs and on 19th April, 2012, Rs. 28.16 lakhs. As a result, the Deputy Municipal Commissioner submitted a proposal to the General Body of the Corporation giving option of either collecting the octroi departmentally or through the agent at the rate of Rs. 40,04,749/- per day in view of the Government instructions dated 19th April, 2011 instructing to increase the rate by minimum 15% more than that of the last year. The Special General Body of the Corporation in its meeting held on 18th April, 2012 accepted the said proposal submitted by the Deputy Municipal Commissioner. On the basis of the said decision, the second respondent was authorised to and started collecting the octroi as agent of the Corporation from the midnight of 19th April, 2012. The petitioner then sent representation to the Corporation on 20th April, 2012 and made offer of Rs. 9 lakh per day more than the amount of Rs. 40,04,749/- per day on the basis of which the respondent No. 2 was appointed as agent of the Corporation to collect octroi. Since no response was received, the petitioner has approached this Court on 23rd April, 2012 for the reliefs referred to above and for consequential direction against the respondents.

4. The petition is resisted by the respondents. A preliminary objection is raised that the petition has been filed supported by affidavit of Jaiprakash Kalyani, Director of the petitioner, who has been blacklisted by the Ahmednagar Municipal Corporation. In that case, the petitioner was not qualified for being appointed as agent of the Corporation for collection of octroi. As regards this objection, it is a

matter to be considered at the stage of scrutiny of eligibility criteria of the bidders. Further, the petitioner has raised issues which are bordering on public interest and if the grievance of the petitioner is to be accepted and direction issued to the Corporation to initiate tender process for the remaining period till 30th June, 2012 and if the offer received in the said tender process is to be higher than Rs. 40,04,749/- per day, it would certainly be in the larger public interest to resort to that procedure.

5. The first question is whether the Corporation could have terminated the tender process. As regards the suspension of tender process commenced on the basis of public notice dated 24th February, 2012, there can be no difficulty in accepting the Corporation's stand that it was out of necessity and not for any other reason. It was done on account of instructions issued by the Urban Development Department on 26th March, 2012 to apply Local Body Tax with effect from 1st April, 2012. Both the regimes of Local Body Tax and collection of octroi cannot co-exist. The Local Body Tax is to replace the octroi to be collected by the Corporation. At the same time, no fault can be found with the Corporation for having commenced the collection of octroi departmentally as agency agreement was not subsisting after 1st April, 2012.

6. The next question is whether the option opted by the Corporation in appointing the erstwhile agent i.e. respondent No. 2 on the meagre rise of 15% over that of the last year offer on per day basis can be said to be the only option available to the Corporation. For considering this submission, it will be useful to advert to the Statutory Rule 2 in Appendix IV, Chapter V of the Bombay Provincial Municipal Corporations Act, 1949, pertaining to Contracts. Rule 2 read thus :

Tenders to be invited for certain contracts.-(1) Except as is hereinafter otherwise provided, the Commissioner or any officer authorised by him in this behalf shall, at least seven days before entering into any contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding three thousand rupees or such higher amount as the Corporation may, with the approval of the State Government, from time to time prescribe, give notice by advertisement in the local newspapers, inviting tenders for such contract.

(2) The Commissioner shall not be bound to accept any tender which may be made in pursuance of such notice, but may accept, subject to the provision of clause (c) of section 73, any of the tenders so made which appears to him, upon a view of all the circumstances, to be the most advantageous:

Provided that the Standing Committee may authorize the Commissioner, for reasons which shall be recorded in its proceedings, to enter into a contract without inviting tenders as herein provided or without accepting any tender which he may receive after having invited them.

7. On a plain interpretation of this provision, it is noticed that the Corporation is

obliged to give contract after inviting tender by giving public notice. It will be apposite to advert to the legal position expounded in the case of *Saroj Screens Pvt. Ltd. Vs. Ghanshyam and Others*, . In paragraph 15, the Apex Court has adverted to its earlier decisions and culled out the proposition as under :

What needs to be emphasised is that the State and/or its agencies/instrumentalities cannot give largesse to any person according to the sweet will and whims of the political entities and/or officers of the State. Every action/decision of the State and/or its agencies/instrumentalities to give largesse or confer benefit must be founded on a sound, transplanted, discernible and well-defined policy, which shall be made known to the public by publication in the Official Gazette and other recognised modes of publicity and such policy must be implemented/executed by adopting a non-discriminatory and non-arbitrary method irrespective of the class or category of persons proposed to be benefited by the policy. The distribution of largesse like allotment of land, grant of quota, permit licence, etc. by the State and its agencies/instrumentalities should always be done in a fair and equitable manner and the element of favouritism or nepotism shall not influence the exercise of discretion, if any, conferred upon the particular functionary or officer of the State.

We may add that there cannot be any policy, much less, a rational policy of allotting land on the basis of applications made by individuals, bodies, organisations or institutions dehors an invitation or advertisement by the State or its agency/instrumentality. By entertaining applications made by individuals, organisations or institutions for allotment of land or for grant of any other type of largesse the State cannot exclude other eligible persons from lodging competing claim. Any allotment of land or grant of other form of largesse by the State or its agencies/instrumentalities by treating the exercise as a private venture is liable to be treated as arbitrary, discriminatory and an act of favouritism and/or nepotism violating the soul of the equality clause embodied in Article 14 of the Constitution.

8. Considering the above, the petitioner is justified in pointing out that the Corporation ought not to have straightway proceeded to appoint the respondent No. 2 merely by giving rise of 15% over that of the last year contract price. The fact that the decision taken was required to be taken by the Corporation in peculiar situation does not justify the action when the Corporation was aware that the remainder period between 18th April, 2012 till 30th June, 2012 (around two and half months or 72 days) was quite substantial period. To ensure that no loss to public exchequer is caused, it should have resorted to tender process to invite offer from public on per day basis contract. Rule 2 enables the Corporation to provide for minimum period for tender process, while ensuring that it is not less than seven days before entering into any contract for the execution of the work. Our attention was invited to the Government Resolution dated 19th April, 2011. It provides that the tender process should be at least of minimum one month period. In the first place, that condition (in the said Resolution) would

apply to ordinary situation and not to extraordinary situation such as in the present case. Inasmuch as the available period of contract was only for about two and half months and that it could not brook delay. Secondly, the statutory Rule 2 enables the Corporation to resort to tender process of at least seven days before entering into any contract. Thus, even on completion of the eighth day from issuance of the tender, the contract can be validly entered by the Corporation. In a situation like the present one, to ensure that public exchequer is not compromised in any manner even for one day's recovery of octroi, we fail to understand as to how the government Resolution pressed into service - which applies to ordinary situations and being only in the nature of executive instructions - can be any impediment to enforce the mandate of statutory Rule 2 which is intended to further the public interest.

9. Notably, if the offer given by the petitioner and if the petitioner is found to be eligible, the Corporation would end up in recovery of additional octroi at the rate of Rs. 9 lakh per day over and above Rs. 40,04,749/- per day, for the remainder period of around 72 days in the month of April, May and June. That amount would be quite substantial. The Corporation has given justification that they preferred to appoint respondent No. 2 on the terms noted in the agreement also because the respondent No. 2 had paid interest free advance amount of Rs. 6,00,71,115/- to the Corporation to enable the Corporation to tide over its expenditure which is to the tune of approximately Rs. 12.5 crore per month. We have our own doubts as to whether this approach can be said to be just and proper much less in public interest. Moreover, keeping in mind the observations of the Apex Court reproduced hereinabove, this justification is of no avail to the Corporation. Rather, it clearly indicates that the Corporation has favoured the respondent No. 2 merely because the respondent No. 2 gave an advance interest free sum of Rs. 6 crores to the Corporation. We fail to understand as to how the Corporation can overlook the possibility of additional gain of octroi amount which would have been as high as Rs. 630 lakhs (i.e. remaining 72 days from 18th April 2012 till at least 30th June, 2012 at the rate of Rs. 9 lakh per day). The loss so suffered by the Corporation cannot be recovered in posterity. Thus, the argument that the respondent No. 2 was preferred as it had advanced interest free amount of Rs. 6 crores, cannot be countenanced and in any case, cannot be said to be in public interest at all. For, the said amount of Rs. 6 crores is refundable and the interest saved thereon cannot offset the loss to be caused to public exchequer.

10. Notably, the impugned resolution passed by the Corporation does not guarantee that the Local Body Tax regime will be introduced from 1st July, 2012. The resolution passed by the Corporation dated 19th April, 2012, on the contrary, makes arrangement for indefinite continuation of the pro tem appointment of respondent No. 2 until Local Body Tax regime is in fact introduced by the Corporation. In this context, we wanted the Corporation to give assurance to the Court that it would adhere to the deadline now notified by the Government i.e. 1st July, 2012. In response, we are informed that the Corporation is taking preparatory steps including to train its staff before

introducing the Local Body Tax regime. But this statement does not reassure us that the regime of Local Body Tax will, in fact, commence from 1st July, 2012. In other words, there is no guarantee that the Corporation would be in a position to start the Local Body Tax collection from 1st July, 2012. In that case the present arrangement of respondent No. 2 to act as octroi agent at the restrictive price as is paid by him will continue indefinitely. Instead, it is but appropriate that the Corporation takes immediate corrective and remedial measures by inviting tenders by giving public notice to appoint agent for collection of octroi "on day to day basis" till the Local Body Tax regime is introduced, so that the best offer and price is received by the Corporation for that contract through public tender process.

11. Considering the above, we have no hesitation in setting aside the decision of the General Body Resolution dated 18th April, 2012 and the consequent work order dated 19th April, 2012 issued by the Deputy Commissioner (Octroi), Ulhasnagar Municipal Corporation appointing respondent No. 2 as agent for collection of octroi. Instead, we direct the Corporation to take immediate steps of inviting tenders for appointing octroi agent on day to day basis offer until the Local Body Tax regime is introduced and that process be "concluded and contract awarded", as expeditiously as possible and not later than two weeks from today, in consonance with the norm provided in Rule 2. As mentioned earlier, the Corporation in the exceptional situation, can provide for tender period of minimum of seven days gap before entering into contract. We make it clear that the Corporation shall start the tender process forthwith from tomorrow.

12. The Commissioner shall be personally responsible to ensure compliance of the above directions within time.

13. In view of this order, the Corporation would be required to start collection of octroi departmentally. But keeping in mind the insufficient collection of octroi departmentally by the Corporation, as noted in paragraph 4 above, it would be appropriate that Respondent No. 2 continues to act as octroi agent of the Corporation until the tender process is commenced, concluded and contract awarded to the highest bidder by the Corporation. We make it clear that Respondent No. 2 shall act as agent for collection of octroi on the same terms as agreed between it and the Corporation, but under this order.

14. Petition is disposed of on the above terms. Parties to act on the authenticated copy of this Order.