
(2016) 03 BOM CK 0156
In the Bombay High Court
Case No : Writ Petition No.752 of 2016

M/s. Nisar Sons

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 31-03-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 ALLMR 715 : (2017) 1 BCR 364 : (2016) 6 MhLJ 418

Hon'ble Judges : B.P. Dharmadhikari and P.N. Deshmukh, JJ.

Bench : Division Bench

Advocate : Mr. C.S. Kaptan, Senior Advocate with Mr. A.P. Kalmegh Advocate, for the Petitioner; Mrs. Bharti Dangre, Government Pleader with Mrs. A.R. Taywade, AGP, for the Respondent Nos. 1 to 3; Mr. M.G. Bhangde, Senior Advocate with Mr. R.M. Bhangde, Advocate, for

Final Decision : Allowed

Judgement

B.P. Dharmadhikari, J.(Oral)—By this petition, filed under Article 226 of the Constitution of India, five petitioners seek quashing of re-auction notice dated 21st of January, 2016 and an order dated 27th of January, 2016 cancelling allotment of sand ghats in their favour. This Court has, on 3rd of February, 2016, issued notice in the matter and while permitting re-auction by respondents, directed that no allotment be done in favour of successful bidder without permission of the Court. This interim order continues to operate even today.

2. Intervenor ? respondent no.4 Pradip Dhengre and Intervenor ? respondent no.5 Vardharaja Pilley claim that in consequential re-auction, they are the highest bidders entitled to allotment of sand ghats at Waki-A and Juni Kamptee-A.

3. This Court has accordingly permitted them to be impleaded as intervenors.

4. Looking to the nature of controversy and as requested by parties, we have heard learned Senior Advocate Shri C.S. Kaptan with Advocate Shri A.P. Kalmegh for petitioners, learned Government Pleader Smt.Dangre with learned Assistant

Government Pleader for respondent nos.1 to 3, learned Senior Advocate Shri M.G. Bhangde with Advocate Shri R.M. Bhangde for respondent no.4 and Advocate A.S. Mehadia for respondent no.5.

5. The parties have been heard finally by issuing rule and making it returnable forthwith, with their consent.

6. Learned Senior Advocate Shri C.S. Kaptan submits that petitioners were required to submit to the terms and conditions unilaterally and arbitrarily imposed, as without submission thereto registration for participation in on-line tender process itself could not have been possible. He states that the standard proforma which was required to be submitted for such registration itself carried a stipulation that petitioners have verified the approach road availability to sand ghats and in future, would not raise any dispute about it. As the petitioners had no other option, they were constrained to submit to the same. In an auction conducted in accordance with law they are found to be the highest bidders and accordingly these sand ghats have been allotted to them. Balance 75 per cent payment out of bid amount was to be completed within fifteen days. Before effecting that payment, when petitioners approached the respective ghats, they found that either there was no such approach road or then there were objections by the elected office barer like Sarpanch to the user of approach road on the various counts. As the approach road itself could not have been used, sand ghat could not have been approached and excavation could not have been carried out. Hence, before expiry of stipulated period of fifteen days, respective petitioners, in writing, pointed out this situation to respondent no.2 ? Collector and sought his intervention. The learned Senior Counsel relies upon the Government policy and relevant terms and conditions regulating the allotment of sand ghats or its working to urge that in the light of this dispute, the respondent nos. 1 to 3 ought to have taken steps to look into it and redress it. However, without undertaking that exercise, first a notice of re-auction was published and after its publication, on next day, the orders cancelling allotment in favour of petitioners have been passed. He, therefore, states that in the light of publication of notice of re-auction and decision to re-auction already taken, quashing or cancellation of allotment of sand ghats in case of petitioners was also pre-decided and hence a "farce" has been only placed for consideration in defence before this Court. He contends that representations made by petitioners have not been looked into with open mind fairly but the same have been rejected in the backdrop of a notice for re-auction to facilitate its holding. Thus prescribed procedure in policy has not been followed and the grievance of petitioners has also not been looked into impartially and unbiased manner. He has taken us through the relevant terms and conditions of policy as also the agreement which petitioners were required to submit for procuring on-line registration, to urge that the respondents have violated those provisions and terms and conditions.

7. The learned Senior Counsel opposes the intervention by urging that re-auction is expressly subject to result of this petition and hence no legal rights of

intervenors has been violated. He has taken support from judgment of Hon''ble Apex Court reported at AIR 1986 SC 1571(1) (Central Inland Water Transport Corporation Ltd. And anr. v. Brojo Nath Ganguly and anr.), particularly paragraph nos.90,94 and 101 to urge that the terms and conditions which forced petitioners to accept the unreasonable stipulations cannot be used to their prejudice. He submits that though everywhere it is specified that maps of respective sand ghats with approach road were available in the office of the concerned authorities for perusal, no such documents were available at any point of time and only because petitioners had accepted not to raise any dispute about the approach road, the otherwise valid offer found to be the highest, is being ignored. He has also invited our attention to individual facts of all cases to submit that material on record reveals that the road was either not available or could not have been used because of objection of Gram Panchayat or Gram Sabha. Our attention is invited to the fact that on 10th of February, 2016 respondent no.2 ? Collector sought information from Tahsildar of respective places about status of approach road. That report has been submitted by the office of Tahsildar, Parshivani and as per that report no approach road as such has been expressly pointed out. He submits that for Bakhari sand ghat at Parshivani allotted to petitioner no.1, it is stated that the approach road is on forest land and it is expressly mentioned by Tahsildar that through survey number under forest department, the road would be required to be prepared. In relation to Saholi (Dorli) sand ghat at Parshivani allotted to petitioner no.2, it is mentioned in that report that approach road on Government land exists. He points out that, however, the report fails to look into objection raised by Gram-Panchayat of that place. The fact that approach road to Juni Kamptee-A sand ghat allotted to petitioner no.5 goes through private land also finds mention in this report. According to him, therefore even after this Court was moved and even after re-auction, the approach road is not available. In this situation, he contends that orders of cancellation as also re-auction need to be quashed and set aside and allotments to petitioners need to be restored and the respective sand ghats should be continued with them.

8. Shri Bhangde, learned Senior Counsel for intervenor Shri Pradip submits that intervenor Pradip claims Waki sand ghat and therefore his intervention opposes the petition as filed by petitioner no.4 - Ravindra. He submits that the said petitioner has not approached this Court with clean hands and terms and conditions duly published were not pointed out to this Court. As per those terms and conditions, verification of approach road is the sole responsibility of said petitioner and Clause 5 or Clause 21 of those terms can never be assailed by petitioner. The said petitioner has executed agreement in prescribed proforma and undertaken not to raise any dispute in relation to approach road. The petitioner declared that he had inspected sand ghat, seen approach road and thereafter has given an undertaking. This agreement or undertaking is also not questioned in the present matter.

9. The learned Senior Counsel Shri Bhangde has relied upon the judgment of Hon''ble Apex Court reported at 2013 (11) SCC 531 Bhaska Laxman Jadhav and

ors. v. Kiaramveer Kakasaheb Wagh Edu.Society and ors., particularly paragraph nos.42 to 47 to point out the effect of such suppression.

10. The learned Senior Counsel further contends that the advertisement and terms and conditions accompanying it are in consonance with policy of State Government and in absence of any challenge to that policy, the grievance of present nature cannot be looked into. To substantiate this contention he draws support from judgment of the Hon''ble Apex Court, reported at (1996) 4 SCC 208 Laxmikant and ors. v. Satyawan and ors. He argues that knowing fully well all terms and conditions, petitioner no.4 participated in the tender/auction process and is therefore estopped from questioning the same, at this stage.

11. Inviting our attention to Clause B (2) of Policy, he states that 25th amount ought to have been deposited by petitioner no.4 on the date of auction itself but petitioner no.4 has not deposited that amount till date. The petition in paragraph no.6 makes an incorrect statement that the acceptance letter has been issued to all petitioners and also to petitioner no.4 on 2nd of January, 2016 and petitioner no.4 was also directed to deposit balance amount. He contends that as petitioner no.4 did not deposit 25th amount, such letter was not issued to him at all. The reasons for cancellation in case of petitioner no.4 are, therefore, different and do not match with the letter of termination dated 27th of January, 2016 in case of remaining petitioners. To point out effect of not depositing this 25 per cent amount on the date of auction itself, he draws support from the judgment of the Hon''ble Apex Court, reported at (1973) SCC 668 State of Madhya Pradesh and anr. v. Firm Gobardhan Dass Kailash Nath.

12. Learned Senior Counsel further states that as per policy, the auction can take place only after finalisation of approach road. There is a report of Tahsildar about the same and hence the revenue authorities have performed their duties. He contends that, petitioner no.4 never attempted to use the road at all and as such grievance made before this Court is without any cause of action. The concerned Gram panchayat pointed out in its letter that road needed to be strengthened and petitioner never complained that road has not been so strengthened. He has taken us through representation dated 13th of February, 2003 filed by petitioner no.4 for said purpose. He further argues that the grievance of this nature ought to have been raised before auction was held. Had there been some substance in such grievance, in that event, auction could have been postponed. He submits that, as such the entire grievance as canvassed on behalf of petitioner no.4 before this Court is liable to be rejected.

13. Pointing out the clauses dealing with removal of obstruction or redressal of the grievance, he states that as bid of petitioner no.4 has never been accepted and there is no allotment of sand ghat to him, these provisions are not attracted in his case. He further submits that the District Level Committee for redressal of grievance under Clause 16 of Policy can look into complaints made by third parties and not by contractor like petitioner no.4.

14. He has invited our attention to additional affidavit filed by intervenor Shri Pradip to show that this sand ghat was auctioned earlier in the year 2011-12 as also 2012-13 and at that juncture no such objection was raised by anybody. He contends that, therefore the grievance of present nature must be dismissed and sand ghat must be allowed to be allotted to intervenor Pradip. He further adds that, as for the period of over two months sand ghat could not be allotted to intervenor Pradip, the tenure of lease should be extended proportionately. He draws support from the judgment of the Hon''ble Apex Court reported at (2003) 1 SCC 726 Beg Raj Singh v. State of U.P. and ors. for this purpose.

15. Advocate Shri Mehadia appearing on behalf of intervenor Vardharaja adopts argument of learned Senior Advocate Shri Bhangde. He points out that petitioner no.5, to whom Juna Kamthi Ghat was earlier allotted, claims that he approached that sand ghat on 13th of January, 2016 for preparation/construction of approach road. As there was no allotment of sand ghat in his favour, he could not have attempted even to construct any approach road. He invites attention to communication dated 20th of May, 2015 sent by Gram Panchayat of Juni Kamthi by which Gram Panchayat pointed out that road was damaged due to plying of heavy vehicles carrying sand and therefore sought its repairs including periodical sprinkling of water to avoid dust problem. He submits that this resolution itself shows that the road is available and was being used.

16. Learned counsel invites attention to Civil Application No.425 of 2016 (disposed of) moved by Intervenor Vardharaja seeking his impleadment, to urge that petitioner no.5 is regularly in business of sand and has been participated in auction of sand ghats. The sand ghats at Juni Kamptee-A, Juni Kamptee-B and Pimpri Kanhan are situated on same road and petitioner no.5 had taken Juni Kamptee-B and Pimpri Kanhan sand ghats in 2012-13 and is well acquainted with location and geographical situation as also approach roads. Advocate Mehadia submits that in this situation the objection raised by petitioner no.5 is clearly by way of afterthought and as he has avoided to deposit the balance amount of 75 per cent, re-auction of Juni Kamptee-A ghat needs to be maintained.

17. Learned Government Pleader has adopted arguments of learned Senior Advocate Shri Bhangde as also Advocate Shri Mehadia. She points out that in petition, there is a specific assertion that petitioners are in business of sand excavation and transportation and have been taking on lease the sand ghats. She therefore submits that all petitioners are aware of the terms and conditions of policy. In this background, she has explained the relevant terms and conditions as contained in the policy. She has also commented on the clauses which deal with removal of obstruction or redressal of grievance. She submits that there is also provision of refund of amount in certain contingencies and as per Clause C (22), the period of grant cannot be extended. She further submits that terms and conditions published before re-auction and terms and conditions contained in policy are in consonance with each other. Auction has been held on 31st of December, 2015 and hence 25 per cent payment ought to have been

effected on that day only. 15th of January, 2016 was the last date for completing payment of balance 75 per cent amount.

18. All representations have been made just before a day or two of expiry of the 15th January, and non-existence or non-available grievance has been made. She points out that petitioner no.2 was allotted Saholi-B Ghat and there Sarpanch of Gram panchayat raised an objection on 12th of January, 2016. After receipt of that letter, petitioner has made representation. She has invited our attention to earlier resolution of Gram-Panchayat dated 22nd of February, 2016 to point out that in that resolution, the gram panchayat pointed out availability of "Pandhan" and its possible use as approach road. The Gram panchayat also demanded 30 per cent of the amount generated in auction as gram panchayat fund. She submits that this resolution of larger body, which expressly permits use of road, supersedes the letter of Sarpanch and that letter cannot stand scrutiny of law. She further points out that date of completing balance 75 per cent of payment mentioned in representation of petitioner no.2 dated 15th of January, 2016 is incorrect.

19. Learned Government Pleader further states that representation of petitioner no.3 also cannot be viewed differently and petitioner no.3 has approached the sand ghat for constructing a private road. She submits that thereafter on 21st of January, 2016 petitioner no.3 submitted a representation objecting to re-auction. According to her, therefore, petitioner no.3 has also not approached this Court with correct facts and clean hands.

20. Petitioner no.1 also claims that he went to sand ghat with a view to prepare the approach road and found that it did not exist. This representation has been made on 13th of January, 2016 and it is received by the office of Collector on 14th of January, 2016.

21. Insofar as cases of petitioner nos.4 and 5 are concerned, she adopts arguments already advanced by learned Senior Advocate Shri Bhangde and Advocate Shri Mehadia. She adds that all these representations were put in inward section at eleventh hour and the Collector even did not get time to verify or reply to it before expiry of period of fifteen days.

22. She has produced before the Court a chart showing in brief out-come of re-auction process. She highlights the loss sustained by the State therein.

23. Learned Senior counsel for petitioners in reply pointed out that in writ petition, in paragraph no.5, it has been specifically pointed out that petitioner no.4 has deposited only 20 per cent of the amount. It is never claimed that the said petitioner has deposited 25 per cent of the amount. It is further pointed out that as in petition there are total five petitioners, while drafting, on account of inadvertence, the case of petitioner no.4 could not be separated while urging that a acceptance letter dated 2nd of January, 2016 was issued to petitioners.

24. Inviting our attention to memo of Civil Application No.425 of 2016, it is

stated that in paragraph no.5 instead of mentioning correct number of petitioner as petitioner no.5, everywhere petitioner no.4 has been mentioned. As such, it was not then felt necessary to obtain any instructions about earlier operation of sand ghats by petitioner no.5. Today during argument Advocate Shri Mehadia for the first time, orally pointed out the error, alleged to be typographical, in paragraph no.5. Learned counsel for petitioners therefore sought time to obtain instructions from petitioner no.5 in this respect.

25. In brief, the contentions already reproduced (supra) have been reiterated to urge that the petitioner cannot be non-suited as they were forced to participate in tender process on terms and conditions which they could not have assailed at the threshold.

26. Perusal of writ petition shows that the petitioners in paragraph no.2 of Writ Petition mention that they are in business of sand excavation and transportation and to take on lease the sand ghats auctioned by respondent nos.2 and 3. Thus, all five petitioners before this Court, therefore, are regularly operating as contractors in the business of sand excavation and participating in ghat auctions. They are therefore aware of the policy decision dated 12th of March, 2013 which regulates the allotment and the auction. It is not their case that they are not aware of the same. That policy vide Clause 2 requires Collector to verify availability of sand stock and available approach road. The Gram Sabha is also expected to recommend auction of such sand ghat before it is undertaken. As per Clause 3(e) of the Policy, video shooting of such gram Sabha is also expected. In Clause 6 of the Policy, person who desires to participate in auction has to tender evidence of the fact that he has been paying income tax regularly and his Pan Number, TIN Number provided by Sales Tax Department. In Clause "C" thereof, terms and conditions of auction to be included in agreement with successful bidder are also given. Clause 4 therein casts an obligation upon petitioner to satisfy himself about availability of sand stock and approach road. It is expressly mentioned therein that no grievance in that respect shall be looked into thereafter. The terms and conditions for E-auction for period up to 30th of September, 2016 are on same lines and there is no inconsistency whatever in the two. The proforma of agreement expressly envisages a declaration and accordingly each petitioner has submitted that declaration. Petitioners have declared that they have inspected sand ghat and approach road and would not raise any objection about its status or about feasibility of such transport by such roads.

27. Thus, all petitioners were, since formation of policy on 12th of March, 2013 were aware of terms and conditions thereof and also of agreement required to be submitted. They were also aware of the obligations cast upon them in relation to availability of approach roads and participated in earlier auctions accordingly. They cannot therefore contend before this Court that they were coerced or forced to sign on dotted lines as a condition precedent. They had earlier also participated in the process and in this situation their reliance upon the judgment

of Hon''ble Apex Court reported at AIR 1986 SC 1571 (1) Central Inland Water Transport Corporation Ltd. & anr. v. Brojo Nath Ganguly and anr. (supra) is unsustainable. In the said judgment Hon''ble Apex Court has considered the plight of a workman as against his mighty employer and observations in paragraph no.90 or other paragraphs on which petitioners have placed reliance need to be appreciated in that background. However, Hon''ble Apex Court in paragraph no.90 has observed that "This principle may not apply where both parties are businessmen and the contract is a commercial transaction." Here petitioners before us are contractors who are regularly doing the business of excavation of sand and hence they cannot be equated with poor workers.

28. Insofar as petitioner no.4 Ravindra Kotal is concerned, it is not in dispute before this Court that he did not deposit the balance amount to raise the amount already in deposit to 25 per cent on 31st of December, 2015 i.e. the date of auction. As per terms and conditions, he has already deposited 20 per cent and shortfall ought to have been deposited by him on 31st of December, 2015. With the result, there is no letter of acceptance in his favour issued on 2nd of January, 2016. In paragraph no.6 of writ petition it has been pleaded on his behalf that there is a letter of acceptance on 2nd of January, 2016 also in his favour. We accept this to be an inadvertent error which had occurred while drafting the common petition. However, it clearly means that sand ghat was never allotted to him and as such after 31st of December, 2015, there was no question of his further participation in tender process. Perusal of judgment reported at (1973)1 SCC 668 State of Madhya Pradesh and anr. v. Firm Gobardhan Dass Kailash Nath, particularly paragraph no.9 therein, shows that the participation of such a person comes to an end upon his failure to complete 25 per cent of the bid amount. Hon''ble Apex Court in facts before it found that such a condition cannot be waived even by the competent authority and before us, there is no plea of its waiver.

29. Petitioner No.4 is concerned with sand ghat at Waki and the report of Tahsildar to Collector in this respect reveals that there exists a road abutting village. It is also mentioned that there is some objection raised by office of Pench Irrigation Project. The Tahsildar has certified that he has verified availability of approach road. The intervenor has produced before this Court on affidavit a communication dated 14th of March, 2016 sent by office of Pench project that petitioner no.4 had never approached it seeking permission to use the bridge for heavy transport. Thus, without even undertaking any such exercise, petitioner no.4 has raised objection on 13th of January, 2016 and did not even point out that he has not completed payment of 25 per cent amount. His representation mentions that he could not find any road at all. Thus representation is again factually incorrect.

30. Conduct of petitioner no.5 Shri Jitendra Maske is not different. In representation dated 13th of January, 2016, after mentioning that he has paid 25 per cent of E.M.D.amount, he states that he had approached for construction of

road and at that time the officers of Municipal Corporation and Nagar Parishad were present there and they did not permit him. They also did not permit him to lift sand. It is further pleaded that the approach road is cement road in village and under apprehension that it would be broken, villagers have obstructed and prohibited its use.

31. It is to be noted that he did not deposit balance amount and therefore there was no final allotment of sand ghat in his favour. As such there was no question of his lifting any stand or attempting to construct any road before completing that payment. Gram panchayat Juni Kamptee on 20th of April, 2015 itself has passed resolution and pointed out availability of road but has also placed on record need to repair it. These documents, therefore, show the availability of road.

32. Though intervenor Vardharaja in Civil Application No.425 of 2016 attempted to demonstrate that petitioner no.5 is aware of availability of approach road and geographical location of this sand ghatm we find that learned counsel representing petitioner no.5 is handicapped because of typographical error in paragraph no.5 of Civil Application No.425 of 2016. It is, therefore, not proper on our part to consider that aspect.

33. The perusal of judgment in Laxmikant and ors. v. Satyawan and ors. (supra) shows that when with knowledge of such terms and conditions petitioners participated in tender process, they are legally estopped from challenging that auction and these terms and conditions.

34. In (2013)11 SCC 531 Bhaskar Laxman Jadhav and ors. v. Karamveer Kakasaheb Wagh and ors., Hon"ble Apex Court has in paragraph Nos.42 to 47 pointed out effect of suppression of facts. Petitioner No.4 has not pointed out that he did not complete 25% of the amount and therefore sand ghat was not allotted to him. He also did not argue and point out that therefore order of cancellation in his case was different than the order of cancellation in case of other four petitioners.

35. When petitioners before this Court are in business of sand excavation and have participated in such auctions even in past, the grievance of present nature being made by them cannot be accepted. They have not pointed out that they were not aware of geographical location of these sand ghats or then were not aware about the position or availability or their status of approach roads. When they are excavating sand from other ghats, it cannot be accepted that they are not aware of location and position of other sand ghats. When they are in trade, they are aware of advantages and degree of difficulties, if any, of other sand ghats also. In any case, in the affidavit, they have accepted the availability of sand stocks and also availability of approach road. They have not pointed out to this Court that they have never operated the relevant sand ghat in the past. Intervenor Vardharaja has attempted to demonstrate that petitioner no.5 has done so and has suppressed that fact. Though we are not accepting this

statement it was obligatory for all the petitioners to plead that they have not operated these sand ghats in past and explain the circumstances in which they claim ignorance of availability of approach roads. Similarly, material which has been pressed into service by both intervenors ought to have been pointed out by the office of Collector by filing affidavit before this Court. Office of Collector also has not taken pains to bring on record correct facts. Said office could have demonstrated the past history of each petitioner. Why said office did not protect interest of State fully and effectively is not understood.

36. The chart produced by learned Government Pleader during argument shows that revenue has in re-auction suffered loss of Rs. 59,66,000/- in so far as Saholi-B sand ghat for which petitioner no.2 has approached this Court. It has suffered loss of Rs. 76, 94000/- as far as sand ghat at Chikna (tahasil Kamptee) for which petitioner no.3 has approached this Court. Petitioner No.4 has approached this Court for Waki-A sand ghat and there in re-auction State Government has suffered loss of Rs. 50,87,999/-. In re-auction of sand ghat at Juni Kamptee-A for which petitioner No.5 is before this Court, the State Government has not sustained any loss as it appears that intervenor Vardharaja has offered same amount/Similarly in re-auction of Bakhari sand ghat in relation to petitioner no.1 before this court. Revenue has gained amount of Rs. 10,42,111/- in re-auction.

37. Sand ghat at Dorli, Tq. Parshivani was also offered for re-auction but the re-auction could not take place as there was no bidder. It appears that in the meanwhile considering the nature of grievance of Contractor in that matter, the State Government has accepted to continue the sand ghat with that Contractor M.Z.Enterprises only. Writ Petition No.843 of 2016 was filed in that respect by M.Z. Enterprises before this Court and it has been disposed of on 30th of March, 2016 in view of this development.

38. Roving attempt made by petitioner is therefore exposed. In this situation, we find that petitioners are not entitled to any relief in these matters. Similarly, request of intervenor Shri Pradip for grant of extension of tenure of lease of sand ghat cannot also be looked into in this petition. We keep that aspect open for due consideration if any occasion therefor arises. It is open to State to recover the loss suffered by it from petitioners and also its officers who avoided to disclose full facts in present matter by proceeding against them as per law.

39. Again keeping on record fact that petitioners did not point out necessary facts to this Court and office of Collector has also failed in assisting this Court properly, we dismiss the writ petition. However, in the circumstances of the case, we decline costs in the matter to State.