

(2007) 10 BOM CK 0045

In the Bombay High Court

Case No : Writ Petition No's. 4480 and 4674 of 2007

Omjee Finance Pvt. Ltd. and Another

APPELLANT

Vs

Amravati Municipal Corporation and Another

RESPONDENT

Date of Decision : 25-10-2007

Acts Referred:

Citation : (2008) 1 CTLJ 176 : (2008) 1 MhLj 678

Hon'ble Judges : R.C. Chavan, J;A.H. Joshi, J

Bench : Division Bench

Advocate : M.G. Bhangde, in W.P. No. 4480 of 2007 and P.C. Madkholkar and R.M. Ahirrao, in W.P. No. 4674 of 2007, for the Appellant; M.K. Pathan in W.P. No. 4480 of 2007 and for Respondent No. 1 in W.P. No. 4674 of 2007 and M.G. Bhangde, for Respondent Nos. 2 and 3 in W.P. No. 4674 of 2007, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Chavan, J.—By Writ Petition No. 4480 of 2007, Omjee Finance Private Limited, a tenderer who had participated unsuccessfully in the tender process, seeks refund of Earnest Money Deposit of Rs. 2,40,00,000/-retained by respondent Amravati Municipal Corporation. Writ Petition No. 4674 of 2007 is filed by one Munna Rathod claiming to be public spirited individual for a direction to the respondent Municipal Corporation to deduct a sum of Rs. 1,13,00,000/-from earnest money deposit of Omjee Finance towards loss caused to the Corporation on account of delay in finalising tender for recovery of octroi.

2. Rule. Made returnable forthwith. Heard by consent of the parties.

These two petitions are fall out of Writ Petition No. 3351 of 2007 filed by M/s Omjee Finance seeking to striking down of a tender condition which made the petitioner ineligible to participate in the tender process. The tender process had commenced by publication of an advertisement on 28-7-2007. The tenders were to be submitted on or before 7th August, 2007 till 3.00 p.m. and envelope No. 1

about eligibility was to be opened at 4.00 p.m. on the same day. On 2-8-2007 the petitioner Omjee filed petition taking exception to the tender conditions. On 3-8-2007 this Court directed the respondents to keep on hold the process of issuance of work order pursuant to tender notice in question. The work was to commence from 12-8-2007. The respondents, however, did not open tenders. On, 6-9-2007 the learned Advocate for respondent Corporation informed the Court that though the Court had asked the Corporation only to keep on hold the process of issuance of work order, the Corporation had not even opened the tenders, because it was thought that it would cause prejudice to the interest of the parties. This Court then directed the Corporation to open tenders and file comparative statement on or before 12-9-2007. The tenders were accordingly opened. The petitioner found that the highest bidder had tendered the bid above the upset price. He sought leave to withdraw the petition, which was disposed of as withdrawn on 13-9-2007, vacating all interim orders.

3. While submitting tender the petitioner had furnished Earnest Money Deposit of Rs. 2,40,00,000/- to the respondent Corporation. The highest bid received was Rs. 49.05 Crores. According to petitioner in Writ Petition No. 4674 of 2007 the delay in awarding contract on account of M/s Omjee's writ petition had caused loss of Rs. 1.13 Crores to the respondent Corporation and therefore, sought direction to the respondent Corporation to deduct this amount from the earnest money deposit of Rs. 2.40 crores lying with the Corporation. The Corporation itself informed the petitioner Omjee in Writ Petition No. 4480/2007 that since the Corporation had suffered loss of Rs. 1,36,93,786/- on account of the delay in awarding the contract due to Omjee's filing petition which allegedly lacked bona fides. Omjee should pay this amount to the Corporation within ten days of the notice, failing which the Corporation was to deduct the same from the amount lying with the Corporation. Aggrieved by this letter dated 28-9-2007 M/s Omjee rushed to this Court as indicated above.

4. We have heard learned Senior Advocate Shri Bhangde for the petitioner Omjee Finance in Writ Petition No. 4480/2007, learned Advocate Shri P.C. Madkholkar for petitioner in Writ Petition No. 4674 of 2007 and learned Advocate Shri M.K. Pathan for respondent Municipal Corporation.

5. The main objection to Omjee's claim seeking a writ directing respondent Corporation to refund earnest money deposit is that Omjee Finance could avail alternate remedy of filing a suit and therefore, was not entitled to invoke writ jurisdiction of this Hon"ble Court.

6. Both, the learned Senior Advocate Shri Bhangde and learned Advocate Shri Madkholkar painstakingly took us through a number of judgments of the Apex Court on the question of maintainability of writ petition when an alternate remedy is available. We have carefully gone through those judgments. It may not be necessary to elaborately discuss those judgments since the following principles could be said to unmistakably emerge from those judgments:

- (a) Ordinarily, when an alternate remedy is available a writ petition would not lie.
- (b) This is a self imposed restriction rather than rule of law and, therefore, in appropriate cases Court may entertain writ petition, though alternate remedy is available.
- (c) Circumstances in which writ petitions have or have not been entertained are not exhaustively enumerated and are considered as and when such circumstances come up for adjudication, e.g.:

A writ would lie:

- (i) When an authority has acted wholly without jurisdiction;
- (ii) where the writ petition is filed for enforcement of fundamental rights;
- (iii) where there has been violation of principles of natural justice ; or
- (iv) where the authority has purported to usurp jurisdiction without any legal foundation.
- (v) Writ would not lie when such dispute involves interpretation of terms of contract etc.

7. Bearing in mind these limitations of our jurisdiction, we find that Writ Petition No. 4480/2007 by M/s Omjee Finance can still be entertained because the petitioner has raised the question of the Commissioner of respondent Corporation usurping the authority not vested in him, namely that of retention of earnest money deposit for reasons not germane to the tender conditions. The petition would also have to be entertained because the questions arose as a consequence of proceedings in Writ Petition No. 3351/2007.

8. The tender document is filed at Annexure-I. Clause (5) thereof requires tenderers to furnish call deposit of Rs. 2,40,00,000/-. The clause further reads that, if the agent whose offer is accepted fails to enter into contract the amount of Rs. 2,40,00,000/- deposited by him as earnest money shall stand forfeited. Call deposit of Rs. 2,40,00,000/- shall remain with the Corporation till the decision regarding acceptance of tender or thirty days from the date of opening of the tender, whichever is earlier. Thus, it is clear that after thirty days from the date of opening of the tender the Corporation cannot retain earnest money deposit in respect of unsuccessful bidders. The Corporation has not shown what authority it has under the terms of the tender to retain or forfeit the earnest money deposit in the situation like the present one. If the respondent Corporation has sustained a loss because of institution and subsequent withdrawal of Writ Petition No. 3351 of 2007 by M/s Omjee Finance, it would be open to the respondent Corporation to institute appropriate proceedings for recovery of the amount so lost. It would obviously be impermissible for the respondent to decide for itself as to what was the quantum of loss caused, or how it was attributable to the actions of the petitioner M/s Omjee; or how the actions of petitioner Omjee were lacking in bona fides as is alleged. It would

undoubtedly be for an independent authority like a Court to decide these questions. The respondent Corporation cannot be a judge in its own cause.

9. It may be useful to recount certain other circumstances. Present petitioner had filed the Writ Petition No. 3351 of 2007 and averred in it that:

(a) For collection of octroi for the year 2006-2007 the tender, was floated however in spite of repeated calls one after other upon reducing the amount towards security deposit and other conditions but no offers were received.

(b) The conditions in the tender were thereafter softened unilaterally and without advertising the modified conditions, the offer of respondent No. 2 therein M/s Konark was accepted as the sole bidder, offering Rs. 37.50 crores as against the upset cost of Rs. 52 crores. Ultimately present respondent No. 2 therein M/s Konark Infrastructures Pvt. Ltd. (Konark IPL) raised the offer to Rs. 38.52 crores.

(c) Grant of Tender was allotted to M/s Konark as done for an amount which was far below the upset price, and this allotment for lower amount was sanctioned by the State Government.

(d) Term of the work of collection of octroi allotted to Konark IPL for the year 2006-2007 was to come to an end at 8.00 a.m. on 12-8-2007 and new contract was to be given on 12-8-2007 at 8.00 a.m.

(e) The tender conditions now advertised have been designed and tailor-made to suit Konark IPL and that there are only three parties in the field eligible to bid as per the tailor-made conditions whose qualification bid has been accepted.

(f) Consequent to its exclusion, apprehending the possibility of cartelisation, the petitioner had moved this Court to protect his right of opportunity of fair competition and also in public interest.

10. The proceedings in that Writ Petition No. 3351/2007 has progressed as follows:

(a) 4-8-2007: This Court on the first hearing on 4-8-2007 granted to the petitioner permission to amend the petition and issued notice before admission and ordered as under:

In the meanwhile, we direct the respondent to keep on hold the process of issuance of work order pursuant to tender notice in question.

(b) 10-8-2007: The Municipal Corporation appeared on due date i.e. on 10-8-2007 and informed the Court that price bids have not been opened. Added respondents were not served and therefore, by continuing the same interim order hearing of the petition was adjourned to 17-8-2007.

(c) 17-8-2007: Hearing was adjourned and Advocate for the Corporation informed the Court that for avoiding complications price bid is not being opened. The case was adjourned for reply to 29-8-2007.

(d) 29-8-2007: The same position continued and the Corporation did not open the price bids. Ultimately, considering that further time was likely to be lost in hearing, this Court, by order dated 29th August, 2007, called upon the bidders to place on record that they should state time limit up to which date the offers given by them shall remain in force.

(e) 6-9-2007: Corporation's Advocate again informed the Court on 6th September, 2007 that price bids have not been opened. This Court, therefore, directed the Corporation to open the price bids on or before 10-9-2007 and the comparative statement be filed in this Court on or before 12-9-2007 and directed that the petition to be listed for hearing on 13-9-2007.

(f) 11-9-2007: On 11-9-2007 a comparative statement of price bids was filed and served on the advocates of petitioner appearing.

(g) 11-9-2007: petitioner has filed an application for withdrawal of the petition stating that on perusal of the price bids offer of Konark was above upset price and sought permission to withdraw the petition.

(h) 13-9-2007: Permission allowing the petitioner to withdraw the petition was granted on 13-9-2007.

(i) 25-9-2007: As is seen from the impugned notice that actual allotment of tender was done to respondent No. 2 on 25-9-2007.

11. It is pertinent to note that previous tender of M/s Konark was for Rs. 38.50 crores, and their bid which is highest and accepted is for Rs. 49.05 crores.

Every day's delay in operating on new offer would be the matter of benefit to M/s Konark by about Rs. 85 Lacs per month by operating at old rates.

12. It has not been brought on record as to on what terms M/s Konark was asked to operate after 12-8-2007. The Corporation alone knows as to on what terms the tender old contractor Konark has been continued between 12-8-2007 to 25-9-2007. The facts are so eloquent that there need be no speculation as to who was to be benefited if allotment of new tender was delayed, or whether the delay caused in opening of price bids was bona fide, without positive perception that new offers were to be for higher amount and the delay would benefit the present contractor operating during the intervening period at the cost of the Corporation, unless the Corporation had stipulated that continuance beyond 12-8-2007 would be at the rates in the highest bid. Before taking up arms against M/s Omjee, the Municipal Corporation would surely look at these aspects objectively.

13. Since the respondent may agitate these questions before appropriate forum we do not propose to go into the aspects of the quantum of loss, its attribute ability to M/s Omjee and the question of bona fide of M/s Omjee in filing or withdrawing Writ Petition No. 3351 of 2007. All the same, we have not been able to comprehend as to what prevented the respondent Corporation from opening

the tenders well before the date of commencement of contract i.e. 12th August, 2007, when all that this Court had ordered was to keep on hold the process of issuance of work order. The petitioner Omjee had approached this Court with a grievance that the tender conditions about eligibility had not attracted number of bidders in the past and therefore, was interested in having a wider competition which would attract a higher bid. Therefore, the moment it found that a bid in excess of upset price had been received the petitioner withdrew Writ Petition No. 3351/2007. Had the respondent opened the tender as scheduled, possibly the petitioner may have withdrawn the petition in time and the respondent could have awarded the contract promptly as per schedule i.e. from 12th August, 2007 obviating the alleged loss which has given rise to these petitions. Even after withdrawal of the petition on 13th September, 2007, the respondent took time till 25th September, 2007 for awarding the contract. We may hasten to add that these observations should in no way be construed as the last word on the subject since it would be open for the parties to agitate the issue in appropriate forum, should they so choose. All that is intended to be pointed out is that prima facie the action of respondent is not justified with reference to the developments in Writ Petition No. 3351/2007.

14. In this view of the matter we hold that M/s Omjee Finance would be entitled to have the earnest money deposit refunded without prejudice to the respondents' right to make an appropriate claim for loss, if any, attributable to M/s Omjee Finance.

15. The petitioner in Writ Petition No. 4674 of 2007 had needlessly rushed to the Court, without even ascertaining as to what the Municipal Corporation intended to do in the matter. The petitioner has filed on record a copy of proceedings of Municipal Corporation dated 20th September, 2007 in which the question of recovery from M/s Omjee was considered. It was decided to defer the decision on the subject till legal advice was obtained. Therefore, in this context, it was not necessary for the petitioner to rush to this Court and to force a decision on an issue which was pending consideration of the respondent Corporation. It can be seen from Annexure-R-1 in Writ Petition No. 4674 of 2007 that the Municipal Commissioner had already written to M/s Omjee on 28-9-2007 seeking to recover from M/s Omjee a sum of over Rs. 1,26,00,000/-. Had the petitioner taken trouble of securing a copy of this letter from the Municipal Corporation's office, he should have been satisfied that the respondent Corporation was not neglecting the interest of citizens of Amravati which the petitioner Munna Rathod wanted to espouse. In that case it would have been unnecessary for him to file this petition.

16. In view of this Rule is made absolute in Writ Petition No. 4480/2007 in the following terms:

(a) impugned communication dated 28-9-2007, Annexure-6, issued by respondent No. 2 Commissioner, Municipal Corporation, Amravati is hereby quashed and set aside.

(b) Consequently, the petitioner would be entitled to refund the earnest money deposit with interest @ 10% per annum, subject to what is ordered in next clause of the directions.

(c) This will not adversely affect if the Municipal Corporation, Amravati, in course of time, decides to take recourse to civil remedy against the petitioner or any other party who in its opinion, may be responsible.

(d) Parties in Writ Petition No. 4480/2007 shall bear own costs.

17. Writ Petition No. 4674 of 2007 is dismissed. Rule therein is discharged. The petitioner Munna Rathod shall pay to respondent No. 2 M/s Omjee Finance costs quantified in the sum of Rs. Ten Thousand.