

(2018) 02 BOM CK 0051
In the Bombay High Court
Case No : 1182 of 2018

P. Gopinath Reddy

APPELLANT

Vs

The State of Maharashtra & Ors.

RESPONDENT

Date of Decision : 14-02-2018

Acts Referred:

Citation : (2018) 02 BOM CK 0051

Hon'ble Judges : S.S. Shinde, S.M. Gavhane

Bench : Single Bench

Advocate : P.M. Shah, D.P. Palodkar, S.B. Yawalkar, M.V. Deshpande, R.N. Dhorde, V.R. Dhorde, P.S. Dighe

Judgement

1. Rule. Rule made returnable forthwith and heard finally with the consent of the learned counsel appearing for the parties.

2. This Petition is filed with following substantive prayers: "(B) The Hon''ble High Court may be pleased to issue writ of certiorari or any other appropriate writ, order or direction in the nature of writ and thereby quash and set aside decision of respondent No.2 in qualifying the bid of respondent No.3) Annexure "C") in respect of the Tender Notice No. :NW/CMC/HEALTH/ET/7642/ 2017, issued by the respondent No.2, for "DoortoDoor Collection and transportation of Municipal Solid Waste up to disposal site in Nanded Waghala City Municipal Corporation",

(C) This Hon''ble Court may be pleased to issue writ of certiorari or any other appropriate writ, order or direction in the nature of writ and thereby quash and set aside the Order bearing No.: NWCMC/Sanitation/16001/2018 dated 25.1.2018 passed by the 2nd Respondent in rejecting the objections submitted by this Petitioner regarding the technical and financial disqualification attached to the bid submitted by the 3rd Respondent,

(D) This Hon''ble High Court may be pleased issue writ of mandamus or any other writ, order or direction in the nature of writ and thereby direct the respondent No.2 issue Letter of Acceptance and to award the contract in favour

of the Petitioner in furtherance of the Tender Notice No: NW/CMC/HEALTH/7642/2017, issued by the respondent No.2 for "DoortoDoor Collection and transportation of Municipal Solid Waste up to disposal site in Nanded Waghala City Municipal Corporation".

3. Earlier the Petitioner herein filed a Writ Petition bearing No.14388 of 2017 (P. Gopinath Reddy s/o P. Chinnathambi Reddy vs. the State of Maharashtra and others), taking exception to the decision of Respondent No.2 in holding Respondent No.3 as qualified for nature of work detailed in the tender document and praying to issue letter of acceptance and to award contract in favour of the Petitioner. In this Petition, the Petitioner has, in Para-9, stated that to avoid repetition and for the sake of brevity the averments made and contentions urged in the memorandum of said Writ Petition may be considered as part and parcel of this Writ Petition. Keeping in view the said statement made in Para9 of the present Petition and to avoid repetition, we would focus our attention to the subsequent stages/ the contentions raised before the Municipal Commissioner by the Petitioner and the order passed by the Municipal Commissioner, Nanded Waghala City Municipal Corporation on 25th January, 2018. The Division Bench of this Court (CORAM:S.V. GANGAPURWALA & V.L. ACHLIYA, JJ.) disposed of the afore mentioned Writ Petition No.14388 of 2017, giving direction to Respondent No.2 to consider and deal with the objections raised by the Petitioner to the technical and financial capacity of Respondent No.3. It was made clear that apart from these two objections about the technical capacity and the financial capacity of Respondent No.3, no other objections need to be considered by Respondent No.2. Depending upon the decision of Respondent No.2 after considering the afore mentioned objections, further directions were issued in the operative part of the order.

4. Mr. P.M. Shah, learned senior counsel, to refresh the memory made elaborate arguments which were also advanced while arguing the afore mentioned Writ Petition No.14388 of 2017. As prayed by the Petitioner in the Petition, in order to avoid repetition, we deem it appropriate to reproduce the arguments advanced on behalf of the Petitioner while arguing the afore mentioned Writ Petition No.14388 of 2017, which are as follows: "3. Mr. P. M. Shah, learned senior advocate for the petitioner submits that respondent No. 3 was not qualified to participate in the tender process as the respondent No. 3 lacked the necessary experience as required under the tender document, so also did not possess the financial capacity as provided under the tender document.

4. According to the learned senior advocate the respondent No. 3 had shown the work done by it for Brihanmumbai Municipal Corporation (hereinafter to be referred to "BMC") to demonstrate its technical capacity and experience. One experience certificate of BMC was produced by respondent No. 3 in the tender process initiated by Surat Municipal Corporation. The respondent No. 3 was disqualified, as the work carried out by respondent No. 3 with BMC was only transport and not door to door collection of solid waste. The decision of the Surat

Municipal Corporation was challenged by the respondent No. 3 before the Gujarat High Court. The said petition was dismissed and it was held that the work carried out by respondent No. 3 with BMC did not pertain to door to door collection of solid waste. The learned senior advocate submits that this fact was suppressed by the respondent No. 3. In the present tender proceedings also the respondent No. 3 to show that he is technically qualified has produced the similar certificate issued by BMC. The nature of work done by the petitioner with BMC was directly and substantially an issue before the Gujarat High Court and the Gujarat High Court negated the contention of respondent No. 3 that his past experience as to the nature of work with BMC was door to door collection. The learned senior advocate further submits that the respondent No. 3 had shown that it has 22 vehicles at its disposal when the tender was submitted by it for Surat Municipal Corporation project. Whereas now the respondent No. 3 has shown that it has 67 vehicles. Even in the chart in the nature of Check List of technical bid in the list of eligible projects respondent No. 3 had indicated the number of project as only one. It is further submitted that the competent authority to issue certificate in relation to past experience is specified as an officer not below the rank of Deputy Commissioner in respect of Corporation. The certificate produced by the respondent No. 3 is issued by the Chief Engineer and not by the officer not below the rank of Deputy Commissioner of BMC. The Chief Engineer (S.W.M.) functions under the control of the Deputy Municipal Commissioner. The same is clear as per Manual I published by BMC.

5. Learned senior advocate further submits that the technical bids of two bidders were rejected on the ground that these two bidders were ineligible on lack of experience for door to door collection of 115 TPD. This shows that the respondent No. 2 - Corporation has treated this requirement as essential condition. The experience certificates of BMC dated 13.12.2016 and 20.5.2017 describes the nature of work as "Hire of vehicles for collection and transportation of MSW including the materials removed from slums." The certificate does not show that it is relating to door to door collection but confined to hire of vehicles for collection. The work order of BMC dated 25.6.2012 shows that all the terms and conditions are relating to and restricted to vehicles only.

6. It is further submitted by the learned senior advocate for the petitioner that the respondent No. 3 fails in financial capacity also. As per para 3.1.2.1 the bidder should possess turn over of Rs.15 Crores per annum during each of last three financial years over all and average minimum annual turn over of Rs.12 Crores for last three consecutive financial years. The respondent No. 3 has submitted list of eligible projects and only one single project is mentioned i.e. BMC project in favour of M/s. R.S.J. (Joint Venture). Only on the basis of one single project the bid was required to be evaluated. The contractual receipts against S.W.M. work are shown for two projects for financial year 20142015 R & B Infra Project the receipt against SWM work are shown as Rs.3,01,70,221/-. This addition is not supported by any document. It is based on undisclosed project. Below the contractual receipts against SWM work of M/s. R.S.J. (J.V.) (40% share

J.V.) is shown as Rs.9,04,49,086. This is the only relevant figure against the singular disclosed eligible project. But the receipts of J.V. are added to the receipts of undisclosed project for showing total as Rs. 12,06,19,307/. Similar addition of such undisclosed project is also made for financial year 20152016 and 20162017. Such manipulative treatment is given only with a view to match the requirement of financial capacity of Rs. 12 Crores for last three consecutive financial years.

7. Learned senior advocate further submits that, even the rates quoted in the earlier tender floated by respondent No. 2 for the same work by the respondent No. 3 shows the total lack of experience of the respondent No. 3 in carrying out the work. In the earlier tender process the petitioner had quoted rate as 1967/per ton, one Amrut Enterprises had quoted the rate as 1373/per ton and the respondent No. 3 had quoted rate as 3051/per ton and now in the instant tender process the respondent No. 3 quoted rate as 1647/per ton. The petitioner quoted rate as 1823/per ton. The arbitrary rates quoted by the respondent No. 3 in the earlier projects shows lack of experience in doing the said work.

8. The learned senior advocate further submits that, omission on the part of the petitioner to raise the objection at the time of scrutiny would not qualify a bidder if the bidder is otherwise disqualified. Two technical bids were rejected by the respondent No. 2 without any objection. On the same lines, respondent No. 2 ought to have rejected the technical bid of respondent No. 3. The magnitude of the project is huge. The capacity of the bidder has to be judged. The trial and error method would prove hazardous. The learned senior advocate relies on following Judgments

[I] Association of Registration Plates Vs. Union of India and others reported in (2005) 1 Supreme Court Cases 679.

[II] Sorath Builders Vs. Shreejikrupa Buildcon Ltd. and another reported in (2009) 11 Supreme Court Cases 9.

[III] W. B. State Electricity Board Vs. Patel Engineering Co. Ltd. and others reported in (2001) 2 Supreme Court Cases 451.

[IV] Sushil Kumar Vs. Rakesh Kumar reported in (2003) 8 Supreme Court Cases 673.

It is further submitted by learned senior advocate for the petitioner that the acceptance of bid of respondent No. 3 is vitiated by non application of mind to the relevant facts and circumstances. The petitioner is ready to match the offer of respondent No. 3, so that there is no prejudice to respondent No. 2."

5. In addition to above arguments, learned senior counsel appearing for the Petitioner submits that Respondent No.2 did not consider the objections raised before it in its entirety. Learned senior counsel invites our attention to the note of written submissions filed by the Petitioner before Respondent No.2, copy of which is placed on record at Page No.488 of the Petition, and submits that as directed

by this Court while disposing of earlier Writ Petition No.14388 of 2017 it was urged before Respondent No.2 that the Judgment of the Division Bench of Gujarat High Court is binding on the Municipal Corporation, Nanded Waghala as well as R and B Infra Project Pvt. Ltd., Respondent No.3 and he has not chosen to challenge the same. Learned senior counsel invites our attention to the Judgment of the Gujarat High Court, Bench at Ahmedabad in Special Civil Application No.2610 of 2017 (R and B Infra Project Pvt. Ltd. vs. Surat Municipal Corporation & another), dated 13th June, 2017 and in particular Para Nos. 6.1 and 6.2 of the said Judgment which has been reproduced in the written notes of arguments which were submitted before Respondent No.2. It is submitted that this Court directed Respondent No.2 to consider the technical and financial capacity of Respondent No.3, more particularly in respect of "the experience with regard to door to door collection of solid waste in wet and dry condition/ transportation up to Disposal/ Treatment/ land filling site/supply of labour for at least three years period under any Municipal Corporation/Urban Local body having collection of solid waste of 115 TPD during last five years. The bidder should have successfully completed at least one work of the said nature."

6. It is submitted that learned counsel appearing for Respondent No.2 agreed before this Court while hearing the afore mentioned Writ Petition No.14388 of 2017 that Respondent No.2 will consider the objections raised by the Petitioner to the technical bid of Respondent No.3. Learned senior counsel invites our attention to the reply filed by Respondent No.3 and submits that inspite of directions given by this Court, Respondent No.2 has not considered the Judgment of the Gujarat High Court in the case of R AND B INFRA PROJECT PVT. LTD. VS. SURAT MUNICIPAL CORPORATION, cited supra, and did not undertake the exercise to consider the copies of the documents placed on record in support of the contention of the Petitioner that as per the tender document issued by Surat Municipal Corporation Respondent No.3 was not qualified to participate in the tender process as Respondent No.3 lacked the necessary experience as required under the tender document, so also did not possess the financial capacity as provided under the tender document. It is submitted that though Respondent No.3 had shown the work done by it for Brihan Mumbai Municipal Corporation (hereinafter to be referred to "B.M.C.") to demonstrate its technical capacity and experience, one experience certificate of B.M.C. which was produced by Respondent No.3 in the tender process initiated by Surat Municipal Corporation, Respondent No.3 was disqualified as the work carried out by Respondent No.3 with B.M.C. was only in respect of transport and not door to door collection of solid waste. The decision of Surat Municipal Corporation was challenged by Respondent No.3 before the Gujarat High Court, however the Gujarat High Court dismissed the Petition filed by Respondent No.3 holding that the work carried out by Respondent No.3 with B.M.C. did not pertain to doortodoor collection of solid waste. Therefore, learned senior counsel submits that on this ground alone the order passed by Respondent NO.2 deserves to be quashed and set aside and matter needs to be sent back again to Respondent No.2 for reconsideration of

the objections raised by the Petitioner that the experience certificate of B.M.C. which was produced by Respondent No.3 in the tender process initiated by Surat Municipal Corporation, was not accepted by the said Corporation since it did not pertain to doortodoor collection of solid waste.

7. Mr. P.M. Shah, learned senior counsel further invites our attention to the copy of certificate issued by Briham Mumbai Municipal Corporation (Solid Waste Management) dated 13th December, 2016, which was produced before Surat Municipal Corporation in the tender process and submits that said certificate was not accepted by Surat Municipal Corporation to accept the claim of Respondent No.3 that it is expert in providing services for doortodoor collection of solid waste. In the present case also the B.M.C. has issued the certificate and therefore once having been rejected the certificate dated 13th December, 2016 submitted by Respondent No.3 with Surat Municipal Corporation to show the experience provided for doortodoor collection of solid waste, the certificate issued by the Municipal Corporation of Greater Mumbai on 20th May, 2017 could not have been accepted in satisfaction of Condition No.3.1.1.1 as laid down in Tender Document, to accept the contention of Respondent No.3 that it has experience of providing services of doortodoor collection of solid waste in wet and dry condition.

8. Learned senior counsel also invites our attention to the contents of the said certificate issued by Municipal Corporation of Greater Mumbai on 20th May, 2017 and submits that the said certificate is signed by the Chief Engineer(SWM), Municipal Corporation of Greater Mumbai. It is submitted that only the officer of the rank of Deputy Commissioner and above is entitled to issue such certificate in view of the provisions of the tender document and therefore the certificate issued by the Officer who is lower in the rank of the Deputy Commissioner of Municipal Corporation ought to have been rejected by Respondent No.2 at threshold. Learned senior Counsel further invites our attention to the contents of the said certificate dated 20th May, 2017 and submits that neither Respondent No.3 possesses technical experience nor it has the financial capacity so as to meet the condition Nos. 3.1.1 and 3.1.2 as laid down in the tender document. It is submitted that Chief Engineer works under the control of Deputy Commissioner which is evident from the ManualI in respect of Municipal Corporation of Greater Mumbai, Solid Waste Management Department. It is submitted that Respondent No.2 even did not issue notice to Respondent No.3 while considering the objections filed by the Petitioner. Learned senior counsel also invites our attention to the certificate issued by the Chartered Accountant which was submitted by Respondent No.3 to show its financial capacity and advanced the arguments similar to the arguments which can be traced out in Para6 of the Judgment in earlier Writ Petition No.14388 of 2017.

9. The sum and substance of the arguments of the learned senior counsel appearing for the Petitioner is that Respondent No.3 is favoured by Respondent No.2 while awarding contract/ tender though Respondent No.3 is not eligible.

Learned senior counsel invites our attention to the discussion in the impugned order while considering the objection raised by the Petitioners and submits that Respondent No.2 without considering the objections properly, was predetermined to reject the said objections and favour Respondent No.3 and therefore the exercise undertaken by Respondent No.2 pursuant to directions issued by this Court in earlier Writ Petition No.14388 of 2017 was to favour Respondent No.3. He submits that the decision making process is liable to be vitiated due to number of factors, and mala fides on the part of Respondent No.2 in awarding the tender are writ large. Learned senior counsel invites our attention to the pleadings in the Petition, written notes of arguments filed before Respondent No.2 and also the averments in the rejoinder and submits that the Petition deserves to be allowed. In support of his contention that the contract is awarded normally to the lowest bidder which is in public interest and that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited, drawn our attention to the exposition of law by the Supreme Court in the case of Sorath Builders vs. Shreejikrupa Buildcon Limited and another, (2009) 11 S.C.C. 9 in the case of Association of Registration Plates vs. Union of India and others,(2005) 1 S.C.C. 679 and in the case of W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and others, (2001) 2 S.C.C. 451

10. On the other hand, learned counsel appearing for Respondent No.2 Corporation too invites our attention to the arguments advanced during the course of hearing of Writ Petition No.14388 of 2017, and in continuation of the said contentions, submits that on the basis of the averments in the reply and relying upon the reasons in the impugned order that the certificate by the Chief Engineer of Brihan Mumbai Municipal Corporation issued in favour of Respondent No.3 is as per the terms mentioned in the tender document as the Chief Engineer is highest authority in cadre of engineering department and treated as equivalent or above the rank of Deputy Commissioner and hence Respondent No.2 had no reason to disbelieve the said certificate. He further submits that the certificate issued by the Chartered Accountant regarding the financial capacity of Respondent No.3 is by the competent authority and Respondent No.2 has no reason to doubt the said certificate. He submits that both the certificates establish the technical and financial capacity of Respondent No.3 as per the requirement, hence the objections raised by the Petitioner were decided by Respondent No.2 to the best of its capacity. The certificate which was submitted by Respondent No.3 before Surat Municipal Corporation in tender process, was not the same which has been submitted in the present tender process. The Petitioner's intention appears to be to stall the proceedings at any cost and with a view that only he should get the contract on his own terms and the same should not be given to any other person. It is submitted that due to protraction of proceedings Nanded city has become so dirty and polluted and it has been declared most air polluted city. Since December, 2016 till November, 2017, the Corporation floated tender for five times but there was no bidder capable or fit to carry out the work that could be allotted. At last in the month of August, 2017,

three bidders responded and filed their bids. The lowest bidder backed out hence his deposit was forfeited. Second lowest bidder was the present Petitioner and third one was present Respondent No.3. The present Petitioner being second lowest was called upon to negotiate the terms and conditions as his rates were some what higher than the estimate etc. It is submitted that the Petitioner has quoted Rs.1967/and agreed to reduce the rate by Rs.50/only quoting Rs.1917/. Since the said was not the reasonable offer, the Corporation decided to float fresh tender. It is to be noted that the Petitioner being second lowest and refused to negotiate further, even then Respondent No.3 was not called upon to negotiate as his rates were very high and therefore the Corporation followed due process of law and decided to call fresh tenders. Therefore, fresh tender was called. In response, five bidders participated, out of that two were disqualified at the time of scrutiny and out of remaining three, the bid of Respondent No.3 was found to be lowest and the Petitioner was second lowest. The rate quoted by Respondent No.3 was not only as per the estimate of Corporation but 4% less, whereas the rate quoted by the Petitioner was again some what near to his earlier bid.

11. Learned counsel appearing for Respondent No.2 further submitted that there was complete transparency and fair play in the tender process. The etenders were called and the rates quoted remain secret till the tender is downloaded. The technical envelopes were opened on 9th November, 2017 and those were visible online to everyone. On 10th November, 2017 the Corporation issued a notice calling upon all the bidders on 15th November, 2017 to finalize the bid. On 15th November, 2017 all the bidders were present and no one including the Petitioner, raised any objection to the technical capacity of any bidder. As no objections were received, the financial bids/ envelopes were opened and Respondent No.3 was found to be lowest. The Petitioner did not challenge anything on that day and accepted the position. But when Petitioner realized that he will not get the contract, he raised objections on 22nd November, 2017 and by that time the financial bid having been accepted, the process stood concluded. Thus, it is clear that the Corporation had followed due process of law, maintained transparency and has given fair opportunity to all. The Corporation has not favoured any one but it has strictly followed the due process of law. Learned counsel submits that the Petition may be dismissed and the Respondent Corporation may be allowed to proceed further.

12. Mr. R.N. Dhorde, learned senior counsel appearing for Respondent No.3, to some extent repeated and reiterated the arguments which were advanced during the course of hearing of Writ Petition No.14388 of 2017. The arguments advanced in the said Petition are reproduced herein: "12. Mr. Dhorde, learned senior advocate for respondent No. 3 submits that the petitioner has not approached this court with clean hands. Earlier the tender was floated by respondent No. 2 on 30th June, 2017. The petitioner was at No. 2 and the petitioner could manage to get withdraw the bid of lowest bidder but however as the petitioner could not succeed in negotiation the Corporation cancelled the tender process and the instant tender was issued. The learned senior advocate

submits that the technical bids were opened online by the respondent No. 2 on 9.11.2017 and it was open for the bidders to verify each and every document filed by all the tenderers. On 10.11.2017 the Corporation issued letters to all bidders to remain present on 15.11.2017 for finalization of technical evaluation. The technical evaluation was done in presence of the petitioner and other tenderers. The petitioner belatedly raised objection on 22.11.2017 with dishonest and malafide intention. Even the financial bids were opened on 15.11.2017. Such objection cannot be considered belatedly, that too from a bidder who has participated in the tender process and is unsuccessful.

13. The learned senior advocate further submits that the exercise of power of judicial review would be called for if the approach is arbitrary or malafide, but where a decision is taken in consonance with nature of a tender document the court has to follow the principle of restraint. Technical evaluation or comparison by court would be impermissible. The learned senior advocate relies on the judgment of the Apex Court in a case of Montecarlo Ltd. Vs. NTPC Ltd. reported in 2016 All SCR 2183, so also another judgment of the Apex Court in a case of Jagdish Mandal Vs. State of Orrissa and others reported in (2007) 14 Supreme Court Cases 517.

14. Learned senior advocate for respondent No. 3 further submits that the respondent No. 3 qualifies the condition about experience of door to door collection of municipal solid waste as per the certificate issued by the BMC. The said certificate clearly refers to the work of "Collection and transportation of municipal waste including door to door collection." Even the work order issued by the BMC to the respondent No. 3 shows that the respondent No. 3 was carrying out the work of door to door collection. The words used in the said work order was house to house collection of solid waste instead of door to door. House to house collection of municipal solid waste would be similar as door to door collection.

15. The learned senior advocate further submits that the Chief Engineer would be of the rank of Deputy Commissioner and the equivalent officer of other organization would include the Corporation. The allegations in respect of not submitting work order in the form of notarised copy is only an irregularity and literal compliance need not be required. The learned senior advocate further submits that the allegation in respect of annual turn over is incorrect. The petitioner is trying to consider only 40% of share in the Joint Venture. The experience of this respondent cannot be calculated only to a certain extent. The experience of the constituents of the joint venture will have to be taken into account to arrive at the experience of joint venture. The learned senior advocate relies on the judgment of this court in M/s. Atasha Ashirwad Builders (J.V.) Vs. State of Maharashtra and others reported in 2011 (1) ALL M. R. 358. The learned senior advocate submits that judgment of the Gujarat High Court relied by the petitioner would not be relevant as the observations in the said judgment are made on the basis of a particular work and in view of the fact of not mentioning

specifically the quantity for door to door collection in the certificate filed before it. While in the present case the certificate mentions the experience of door to door collection and the specified quantity of solid waste carried per day. The said judgment is not applicable. According to the learned senior advocate the petition being filed with malafide intention deserves to be dismissed."

13. In continuation to aforesaid arguments, learned senior counsel appearing for Respondent No.3 submits that the certificate which was produced in the tender process which was undertaken by Surat Municipal Corporation was different. Before the Gujarat High Court the tender document of Brihan Mumbai Municipal Corporation was not placed on record. Therefore, this Court while hearing afore mentioned Writ Petition No.14388 of 2017, in Para 24 of the Judgment, recorded the contentions of Respondent No.3 that before the Gujarat High Court the work order received from B.M.C. to Respondent No.3 was not placed on record and only on the basis of certificate the contentions raised in the Petition were considered. So also the certificate produced before the Gujarat High Court was not in the manner as the certificate dated 20th May, 2017 produced by Respondent No.3 in the instant tender process, which states that the work was regarding collection and transport of municipal solid waste including doortodoor collection.

14. Learned senior counsel further invites our attention to Para 17 of the Judgment in the afore mentioned Writ Petition No.14388 of 2017 and submits that this Court has observed that, it is a fact prior to the instant tender five times the Corporation had floated the tender for selection of operator for door to door collection and transportation of Municipal solid waste up to disposal site in Nanded Waghala City Municipal Corporation, however, could not get the qualified and successful bidder. Therefore, he submits that there is no substance in the contention raised by the Petitioner that Respondent No.3 is favoured by Respondent No.2. He submits that admittedly Respondent No.3 is a lowest bidder. In pursuance to the tender notice, the Petitioner as well as Respondent No.3 submitted their offers along with one other as under:

(I) R & B Infra Project i.e. Respondent No.3 Rs.1647/per Ton

(II) P. Gopinath Reddy i.e. Petitioner Rs.1823/Per Ton

(III) Swachhata Corporation Rs.1959/per Ton

15. Learned senior counsel invites our attention to the copy of the certificate dated 20th May, 2017 issued by Municipal Corporation of Greater Mumbai, and submits that the contents of the said certificate would make it clear that Respondent No.3 possess the experience of doortodoor collection of solid waste. He invites our attention to the tender document regarding the tender floated by Municipal Corporation of Greater Mumbai and in particular Clauses 1(a) to (c) and 2A to show that Respondent No.3 was granted tender by the B.M.C. only after satisfying that Respondent No.3 has experience of doortodoor collection of solid waste. In support of his submissions, learned senior counsel invites our

attention to clause 1(c) of the said tender document, which reads as under: "(c) It is expected that the SWM department will eliminate the community bins by increasing door to door collection of refuse in the ward during the contract period. Therefore, the contractor shall not object to the change of refuse collection from "community collection" centers to "Door to Door Collection" nor demand any extra payment due to change in collection system. The process of changing over to Door to Door collection from collection of refuse from community centers will continue during the contract period till 100% "Door to Door Collection" is achieved by the ward. However, the vehicle services will remain unchanged, or may vary to certain extent."

16. Mr. R.N. Dhorde, learned senior counsel invites our attention to the exposition of law by the Supreme Court in the case of Montecarlo Ltd. vs. NTPC Ltd, 2016 ALL S.C.R. 2183 and submits that where a decision is taken that is manifestly in consonance with language of tender document or subserves purpose for which tender is floated, the Court should principle of restraint, and technical evaluation or comparison by Court would be impermissible. In support of his submissions, learned senior counsel also invites our attention to the exposition of law by the Supreme Court in the cases of Jagdish Mandas vs. State of Orissa and others, (2017) 14 S.C.C. 517 M/s. Poddar Steel Corporation vs. M/s. Ganesh Engineering Works and others, AIR 1991 S .C. 1579

17. Mr. Dhorde, learned senior counsel further submits that for judging the credentials of a joint venture, the past experience of the constituents of the joint venture will have to be taken into account to arrive at the experience of joint venture. In support of his contentions he invites our attention to the Judgment delivered by the Division Bench of the Bombay high Court, Bench at Nagpur, in the case of M/s. Atasha Ashirwad Builders (J.V.) vs. State of Maharashtra and others, 2011(1) ALL M.R. 358 Therefore, he submits that the Petition deserves to be rejected.

18. Learned counsel appearing for Respondent No.4 relying upon the averments in the affidavit in reply submits that Respondent No.4 has issued certificates to R & B Infra Project Ltd along with Annexure A. The total cost of work of the Municipal Corporation of Greater Mumbai is Rs.131,42,80,863/to the Joint Venture of (1) R & B Infra Project Pvt. Ltd. (2) Shri Shakti Enterprises (3) JP Enterprises. It is submitted that Respondent No.4 chartered accountant had audited the accounts of R & B Infra Project Pvt Ltd. i.e. Respondent No.3 and accordingly he has issued the certificate to Respondent No.3. Learned counsel invites our attention to the copy of the certificate dated 2nd February 2018 indicating the figures regarding amount is received from (a) VasaiVirar Municipal Corporation and (b) Daman & Diu of Rs.3,01,70,221/for the year 201415, Rs.3,27,18,961/for the year 201516 and Rs.3,75,21,781/for the year 20162017. It is further submitted that the said certificate clarifies the position as per the book of accounts of Respondent No.3, which was verified at the relevant time. It is therefore submitted that financial position of Respondent No.3 is very sound.

19. We have given careful consideration to the submissions of learned senior counsel appearing for the Petitioner and Respondent No.3, learned counsel appearing for Respondent Nos.2 and 4 and learned Additional Government Pleader appearing for the State. With their able assistance, we have perused the grounds taken in the Petition, annexures thereto, rejoinder filed on behalf of the Petitioner, the affidavits in reply filed on behalf of the respective Respondents and the case laws relied upon by the learned counsel appearing for the respective parties.

20. At the outset it would be apt to refer herein below the conclusions reached by the Division Bench of this Court (CORAM: S.V. GANGAPURWALA & V.L. ACHLIYA, JJ.) in earlier Writ Petition No.14388 of 2017. In Para 17 of the Judgment, the Court has taken a note of fact that prior to instant tender five times the Corporation had floated the tender for doortodoor collection and transportation of Municipal solid waste up to disposal site in Nanded Waghala City Municipal Corporation, however the Corporation could not get the qualified and successful bidder. In Para 18 there is discussions about the steps taken by Respondent No.2 pursuant to tender. In Para 19 of the Judgment, the Court has noted that the Corporation issued letter on 10th November, 2017 inviting all the five bidders for finalization of technical evaluation on 15th November, 2017. It is also observed that all the bidders had access to the documents and the technical bids of the bidders. It is specifically observed that the Petitioner did not raise objection to the technical bid of Respondent No.3. The Corporation disqualified two bidders on the ground that they are not technically qualified and do not possess the experience of door to door collection of municipal solid waste. On the same day i.e. on 15th November, 2017 the financial bids were opened and Respondent No.3 was found to be the lowest bidder. It is specifically observed that, thereafter, for the first time on 22nd November, 2017 the Petitioner raised objections to the technical evaluation of Respondent No.3 so also the documents annexed by Respondent No.3 to its tender. The said conclusion recorded by this Court on factual score clearly indicates that belatedly one week after the financial bids were opened, the Petitioner raised the objection to the technical evaluation of Respondent No.3. . In Para 20 of the Judgment it is observed that: "20. This court in exercise of its writ jurisdiction under Article 226 of the Constitution of India would be slow to exercise the powers of judicial review. The Corporation and its Committee conducting the technical evaluation are experts. If the decision taken is manifestly in consonance with any of tender document or subserves purpose for which tender is floated then the court should follow the principle of restraint as held by the Apex Court in a case of Montecarlo Ltd. Vs. NTPC Ltd. referred to supra."

21. The Court has also reproduced Clauses 3.1.1 Technical Capacity and 3.1.2 Financial Capacity of the tender document, in Para 21 and 22 of the Judgment. Since the copy of the said Judgment is on record, we avoid to repeat the same. In Para 23 of the Judgment there is discussion that the committee of the Corporation has to consider the technical and financial capacity of the bidder i.e.

the experience with regard to door to door collection of solid waste in wet and dry condition / transportation up to Disposal/Treatment/land filling site/ supply of labour for at least three years period under any Municipal Corporation/ Urban Local body having collection of solid waste of 115 TPD during last five years. The bidder should have successfully completed at least one work of the said nature. In Para 24 of the Judgment there is discussion about the contentions raised by the Petitioner that in a tender floated by Surat Municipal Corporation for door to door collection of solid waste, Respondent No.3 was held disqualified. However, this Court has noted the contention of Respondent No.3 in the said paragraph that, before the Gujarat High Court the work order received from B.M.C. to Respondent No.3 was not placed on record and only on the basis of certificate the Court proceeded to decide the Petition and further the certificate produced before the Gujarat High Court was not in the manner as to the certificate dated 20th May, 2017 which was produced by Respondent No.3 in the instant tender process which states that the work was regarding collection and transport of municipal solid waste including door to door collection.

22. It appears from the discussion in Para Nos.25 and 26 of the Judgment that since the technical evaluation is a job of body of experts and also the objection raised by the Petitioner subsequently to eligibility of Respondent No.3 was not before Respondent No.2 at the time of assessing technical capacity and also the tender document issued by the B.M.C. was not before Respondent No.2, the Court thought it fit to ask Respondent No.2 to consider the objections raised by the Petitioner including that of disqualification of Respondent No.3 by Surat Municipal Corporation.

23. Pursuant to the directions, vide impugned order dated 25th January, 2018, issued by this Court, Respondent No.2 considered the objections raised by the Petitioner and in relation to objection of technical capacity of Respondent No.3, recorded the conclusion that the certificate issued by the Municipal Corporation of Greater Mumbai in favour of Respondent No.3 itself establishes that Respondent No.3 has completed the work of House to House collection of wet and dry garbage on daily basis and on any count the certificate issued by Mumbai Municipal Corporation cannot be doubted. It is observed that the certificate is signed by Chief Engineer and the post of "Chief Engineer" is equivalent to "Deputy Commissioner" or above in its cadre and the said authority is competent enough to issue experience certificate. Respondent No.2 further observed in the impugned order that the required technical capacity of the bidder mentioned in the tender document itself clearly mentions as "Door to Door collection of solid waste in wet and dry condition/ transportation upto Disposal/ Treatment/ Land filling site/ Supply of labour for at least three years period under any Municipal Corporation/ Urban Local Body having capacity of collection of Solid Waste of 115 TPD during last five years". It is further observed by Respondent No.2 that the certificate of Greater Mumbai Municipal Corporation is sufficient to hold that Respondent No.3 has got requisite experience and it is further observed that, after due consideration it is found that the objection raised

by the Petitioner does not survive and hence the objections regarding technical capacity stands rejected.

24. Respondent No.2 has also considered the objection about financial capacity of Respondent No.3 and relying upon the certificate issued by Respondent No.4 in favour of Respondent No.3, held that the said certificate establishes that the turn over of Respondent No.3 is Rs.12.30 Crores per year. The aforesaid findings/ conclusions reached by Respondent No.2 are on the basis of appreciation and scrutiny of the documents which were on record. This Court is not sitting in appeal over the order passed by Respondent No.2. As already observed by this Court, technical evaluation is job of the experts in the field and not for this Court to undertake such exercise.

25. We have carefully perused the contents of the certificate dated 20th May, 2017 issued by the Municipal Corporation of Greater Mumbai and relevant clauses of the tender document and we find that the findings/ conclusions reached by Respondent No.2 on the basis of documents before it that Respondent No.3 has the experience of door to door collection of solid waste, appears to be in consonance with the documents and material placed on record. There is no dispute that the certificate which was placed before the authorities of Surat Municipal Corporation is not the same experience certificate, and the certificate dated 20th May, 2017 is different. Therefore there are two different certificates having different contents, which are capable for different conclusions and purport and therefore we do not find any reason to interfere in the reasons assigned in the order dated 25th January, 2018 passed by Respondent No.2.

26. It is true that Respondent No.2 has not directly undertaken the exercise of comparison of the documents which were produced before Surat Municipal Corporation by Respondent No.3. However, the fact that there are two different certificates with different contents, one submitted before the authorities of Surat Municipal Corporation and another submitted in the present tender process. We find considerable force in the contentions raised by learned counsel appearing for Respondent Nos.2 and 3 that when the tender was floated in earlier round, the Petitioner was given an opportunity to negotiate, however he failed to avail of the said opportunity and therefore he should blame himself for not negotiating with Respondent No.2 Municipal Corporation at the proper time regarding the rates quoted by him. The fact that the tender was floated for five times in the past, would negate the contention of the Petitioner that there is mala fide exercise on the part of Respondent No.2 to favour Respondent No.3. Admittedly, the rates quoted by Respondent No.3 are at lower side. We also do not countenance the attempt of the Petitioner to raise objections for the first time on 22nd November, 2017 when admittedly the financial bids were opened on 15th November, 2017. After the lapse of the period of one week there was an attempt on behalf of the Petitioner to raise objections to the technical as well as financial bid and said delay in tender process which has been floated for the purpose of collection of solid waste from door to door, needs to be seriously viewed.

27. Coming to the objections raised by the Petitioner to the financial capacity of Respondent No.3, in our opinion, once the certificate is issued by the Chartered Accountant, who is competent authority to issue such certificate, in routine course we should not doubt the correctness of the said certificate. Be that as it may, Respondent No.4 has filed affidavit in reply and about the financial capacity of Respondent No.3 it is stated that as per the books of account of Respondent No.3, following is the clarification:

Financial year

2014-15 i) Amount received from other works

ii) Amount received from Joint venture

Rs.3,01,70,221/

] Rs. 9,04,49,086/

Total Rs.12,06,19,307

2015-16 i) Amount received from other works

ii) Amount received from Joint Venture

Rs.3,27,18,961/

Rs. 8,18,78,395

Total Rs.11,45,97,356

2016-17 i) Amount received from other works

ii) Amount received from Joint Venture

Rs.3,75,21,781/

Rs. 9,63,44,285

Total Rs.13,38,66,066

In that view of the matter, even the objection raised by the Petitioner about financial capacity of Respondent No.3 shall fail.

28. In our opinion, merely because Respondent No.2 has not undertaken minute examination/scrutiny of the certificate which was placed before Surat Municipal Corporation by Respondent No.3 and decision of said Municipal Corporation and dismissal of Writ Petition by the Gujarat High Court, would not lead to the conclusion that the decision making process has been vitiated. As already observed, the certificate submitted in the tender process before Surat Municipal Corporation was different than the certificate submitted in the present tender process.

29. At this stage, we must remind ourselves by the following observations made by the Supreme Court in the recent pronouncement in the case of Montecarlo

Ltd. vs. NTPC Ltd., cited supra: ".....Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

30. In the light of discussion herein above, in our considered view the decision taken by Respondent No.2 is in consonance with the language of the tender document and serves the purpose for which the tender is floated. We restrain ourselves from causing any interference, since we are convinced that neither there is any arbitrary exercise of power nor malafide nor the procedure adopted by Respondent No.2 is to favour Respondent No.3.

31. For the reasons aforestated, we are not inclined to entertain this Petition. Hence the Writ Petition stands rejected. The Rule stands discharged. After pronouncement of the Judgment, learned counsel appearing for the Petitioner prays for continuation of adinterim order of status quo for further two weeks. The prayer is vehemently opposed by the counsel for the Respondents. Since the contract relates to collection of garbage/solid waste from door to door and any further continuation of order of status quo would cause interference in collection of such garbage/ solid waste and ultimately public interest would suffer. In that view of the matter, we are unable to persuade ourselves to continue the order of adinterim relief any further. The prayer stands rejected.