
(2008) 03 BOM CK 0016

In the Bombay High Court

Case No : Writ Petition (Lodg) No. 2714 and Public Interest Litigation No. 72 of 2007

Shree Ostwal Builders Ltd., Thane and another

APPELLANT

Vs

State of Maharashtra and others

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2008) 3 ALLMR 529 : (2008) 3 BomCR 36 : (2008) 110 BOMLR 1209 : (2008) 4 MhLj 404

Hon'ble Judges : Swatanter Kumar, C.J.;J.P. Devadhar, J

Bench : Division Bench

Advocate : N. H. Seerwai, P.K. Dhakephalkar, with T.N. Tripathi instructed by T.V. Tripathi and Co. in W.P. LODG No. 2714/ 2007 and R.D. Soni instructed by Ram and Co. in P.I.L. No. 72/2007, for the Appellant; G. W. Mattos, A.G.P. for State, S. H. Aney with A. Dasgupta instructed by J. Narula and Associate, for the Respondent

Final Decision : Allowed

Judgement

J.P. Devadhar, J.—The challenge in these two cases, is to the public tender issued by the Government on 20-5-2007 insofar as it relates to inviting tenders by invoking the "Swiss Challenge Method".

2. As the question raised in these two cases are common, both the cases are admitted, heard together and disposed of by this common Judgment.

3. "Swiss Challenge Method" is a method invoked by the Government with a view to accelerate rapid growth of the housing sector in the State by inducing private entrepreneur through public - private partnership (PPP). In view of the resource crunch, the Government considers it prudent to enter into joint venture agreements with private parties for development of the Government lands by invoking the Swiss Challenge Method. Under this method, any person/firm/ association/private developer can approach the public authorities with his

innovative proposal for development of the Government lands. The said proposal is scrutinized and if found to be technically and financially viable, the proposal is accepted and thereafter public tenders are invited by invoking the Swiss Challenge Method, which means that the person who has voluntarily submitted a proposal for development of the Government lands ("originator of the proposal" for short) would be entitled to the joint venture contract even if he is not the highest tenderer, provided the originator of the proposal agrees to raise his bid to that of the highest tenderer. In other words, under the Swiss Challenge Method, the originator of the proposal has the right of first refusal or right of first choice to match the offer given by the highest tenderer and bag the joint venture contract even though he is not the highest tenderer. If the originator of the proposal declines the option, then the contract is awarded to the highest tenderer whose bid is found to be most competitive. If the highest tenderer backs out, then the earnest money deposited by the highest tenderer is forfeited. Thus, according to the State, the right of first refusal contained in the Swiss Challenge Method serves twin purposes. Firstly, it boosts or encourages private participation in the development of the government lands and secondly, the development contract is awarded at the best competitive price ascertained from the bids received from the public tender. Therefore, it is claimed that the decision to invoke the Swiss Challenge Method at the best competitive price is a policy decision taken by the Government in public interest.

4. However, the petitioners contend that neither the respondent No. 7 can be said to be originator of the proposal nor invoking the "Swiss Challenge Method" is in public interest.

5. For better appreciation of the controversy and the background facts that led to the issuance of the public notice dated 20-5-2007, we may refer to the facts set out in Writ Petition (L) No. 2714 of 2007.

6. On 25th August, 2006, M/s Ravi Developers (respondent No. 7) submitted a proposal to the Hon'ble Chief Minister, Maharashtra State for development of 3.55 Hectors of land situated at Mira Road, bearing Survey No. 226 to 230 (erroneously mentioned as Survey No. 126 to 130), 150 (part), 151 (part) (hereinafter referred to as the "said lands") belonging to MHADA, an authority constituted by the State Government. It was stated in the said proposal that the balance potential available on the said lands was 69000 sq. mtrs. (residential) and 2800 sq. mtrs. (commercial) and that the respondent No. 7 was willing to develop the said lands at his own cost and in consideration thereof willing to hand over saleable residential area admeasuring of 17250 sq. mtrs. and commercial area admeasuring 700 sq. mtrs. free of costs to MHADA.

7. On 20th October, 2006 the said proposal was forwarded by the section Officer, Government of Maharashtra to the Chief Officer, Konkan Grih Nirman Bhavan for remarks. The Konkan Housing and Area Development Board which is a regional unit of MHADA as also MHADA approved the proposal and by a letter dated 24th April, 2007 informed the Principal Secretary, Housing Department, Government

of Maharashtra that after considering various options, it is felt that the "Swiss Challenge Method is more desirable as it is totally transparent and is open to public. It was further stated that under the said method the originator of the proposal gets a chance to develop the property by a democratic method provided he raises his bid upto the bid offered by the highest tenderer. Accordingly, MHADA sought approval from the Government for going ahead with the proposal as per the draft tender and tender notice submitted by them.

8. On receiving approval from the State Government, a public notice was issued inviting tenders for development of the said lands. Relevant clauses in the said public notice dated 20-5-2007 (as translated) read thus :-

Project details

1.1 Maharashtra Housing and Area Development Authority (MHADA) established under MHADA Act, 1976 is engaged in the activity of housing development, Konkan Housing and Area Development Board is a regional unit of MHADA. An opportunity to private develop land at MIRA ROAD, DISTRICT THANE, owned by MHADA, is made available.

1.2 Scheme of the Project:

1. The work of Planning, scheme, actual construction and for that purpose obtaining necessary sanctions from various authorities concerned shall be done by the developer.

2. The area of the said project is approximately 3.55 hectares, bearing Survey Nos. 226 to 230, 150 (part) and 151 (part).

3. The successful developer has to prepare plans/designs in consultation with MHADA.

4. In this project approximately 60% of the flats should be for Lower Income Group, if possible.

5. Plans shall have got to be sanctioned by the Mira-Bhayander Municipal Corporation. Save and except the minimum area required to be handed over to MHADA free of costs, the developer will be at liberty to sell remaining area at market price.

1.3 Details of the Project:

1. Area-Aproximately 3.55 hectares.

2. Area available for construction - Approximately 70,000 sq. meters.

3. The specifications of the flats, which are required to be handed over to MHADA free of costs, shall be as directed by MHADA.

4. The remaining area, as per sanctions of Mira-Bhayandar Municipal Corporation, may be utilised for High Income Group and Commercial purpose.

1.6 SWISS CHALLENGE METHOD

1. MHADA has received a Suo Motu proposal from a developer for development of this land. The tenders will be received in response to this advertisement will be compared with the proposal given by the developer (original proposer) to MHADA. As per the Swiss Challenge method the developer who has given the original proposal has the opportunity (first right of refusal). However, the said developer has to match/ raise his bid (rate) with the highest proposal tendered. The original proposer shall have the opportunity to take up the project on highest offer, and in the event if he refuses, then the highest bidder shall have right to implement the project. As such if the original proposer exercises his right of first refusal then the project will be offered to the highest bidder. However, if such highest bidder refuses the offer then the amount deposited shall be forfeited.

9. After holding pre bid conference on 7-6-2007, the tenders received from different parties were opened on 11-6-2007. On scrutiny of the tenders received, following 4 persons were found to be eligible tenderers:-

Sr. No. Name of the tenderer Bid

1. M/s E.B.R. Enterprises 16,713.00 sq. mtrs. carpet area
2. M/s Harshad P. Doshi Associates 17,118.00 sq. mtrs. carpet area
3. M/s Ravi Developments 17,476.49 sq. mtrs. carpet area
4. Mr. Ostwal Builders Ltd. 30,006.00 sq. mtrs. carpet area

10. Thus, the bid offered by shree Ostwal Builders Ltd., the petitioner No. 1 in Writ Petition (L) No. 2417 of 2007 for development of the said lands was held to be the most competitive bid under which the saleable area offered to MHADA free of cost was 30006 sq. mtrs. carpet area compared to 17476.49 sq. mtrs. offered by the respondent No. 7.

11. Thereafter, as per the "Swiss Challenge Method" contained in the public notice, MHADA called upon the respondent No. 7 to exercise his right of first option. By a letter dated 14-6-2007 the respondent No. 7 agreed to accept the project on the terms offered by the highest tenderer.

12. Before the contract was awarded to the respondent No. 7, P.I.L. No. 72 of 2007 was filed on 4-9-2007 to challenge the very same public notice dated 20-5-2007, insofar as it relates to awarding the contract by following the Swiss Challenge Method and on 18-10-2007, this Court ordered that all steps taken during the pendency of the said PIL, shall be subject to the final orders that may be passed. In the meantime, by letters dated 20th July, 2007, 23rd July, 2007 and 15th October, 2007, the highest tenderer Shree Ostwal Builders Ltd. called upon MHADA to take necessary steps for awarding the contract to them. There was no response from MHADA to the above letters. On receiving documents under the Right To Information Act, 2004, Shree Ostwal Builders Limited filed Writ Petition (L) No. 2714 of 2007 on 11-12-2007 to challenge the public notice

dated 20-5-2007 to the extent it relates to invoking Swiss Challenge Method and also the decision taken by MHADA on 22-11-2007 to award the contract to the respondent No. 7.

13. Mr. Seerwai and Mr. Dhakephalkar learned Senior Advocates and Mr. Soni, learned Advocate appearing on behalf of the respective petitioners have submitted that the entire bidding process was devised and designed with a mala fide intention to favour the respondent No. 7. It is contended that since the respondent No. 7 had approached the Hon"ble Chief Minister with a proposal to develop the government lands, the authorities have adopted the "Swiss Challenge Method" with a view to give preferential treatment to the respondent No. 7 without any justification.

14. The Counsel for the petitioners further contend that in awarding government contracts, the action of the government ought to be fair, transparent and should give level playing field to all the eligible bidders and it should not be distributing largesse to the favored persons.

15. It is further contended by the counsel for the petitioners that the Swiss Challenge method lacks transparency, level playing field, equality of opportunity, competitive bidding and fairness. It is submitted that the right of first option given to the respondent No. 7 merely because he has approached the Hon"ble Chief Minister is totally unfair to the other participants and it is just and proper that the contract is awarded to the highest tenderer or all the four tenderers are given an opportunity to raise their bid and then award the contract whose bid is the highest.

16. It is further contended that MHADA is established under a statute for the specific purpose of providing housing to lower and middle income group, in view of the acute shortage of housing in and around Mumbai. Therefore, the joint venture project entered into by MHADA with a favored private developer is beyond the scope for which MHADA was established.

17. Relying upon the decision of the Apex Court in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, it is submitted that the public authority or the State Government cannot have unfettered discretion and the doctrine of executive necessity has limited application in such cases. It is submitted that the Wednesbury principle of fairness in administrative decisions applies in the matter of awarding government contracts by invitation of public tenders and in the present case, awarding the contract to the respondent No. 7 without any justification is liable to be quashed and set aside.

18. On behalf of the respondents, Mr. Aney, learned senior Advocate and Mr. Mattos, learned A.G.P. contend that the tender process was completed on 11-6-2007, whereas PIL was filed belatedly on 4-9-2007 and the Writ Petition by the highest tenderer was filed still later on 11-12-2007. As both the cases suffer from gross delay and laches, no relief can be granted in favour of the petitioners.

19. Learned counsel for the respondents further contend that the policy of the Government to enter into joint venture public- private partnership (PPP) is in public interest and the same is intended to accelerate the rapid growth in the housing sector. As there is resource crunch, it is considered just and proper to adopt PPP for development in housing sector. To boost private participation, the originator of the proposal is offered the right of first refusal under the Swiss Challenge Method. There are enough checks and balances provided in the said method, in the sense that the originator of the proposal is required to develop the lands on the terms offered by the highest tenderer, so that there is no loss to the exchequer. If the originator of the proposal declines, then, the highest tenderer is called upon to execute the contract, failing which the earnest money deposit is forfeited. This ensures that the tenders submitted are realistic and competitive.

20. It is further submitted on behalf of the respondents that since the originator of the proposal conceptualises the entire project, precious time and money of the public authorities are saved in that behalf. Therefore, Swiss Challenge Method introduced by the Government cannot be said to be unjust, illegal or contrary to law.

21. Learned counsel for the respondents further contend that the Swiss Challenge Method has been introduced with the approval of the government and, therefore, it cannot be said that the public tender in question was issued without any authority. The argument that there is no level playing field and the government largesse is being distributed to the originator of the proposal is also without any merit, because, the originator of the proposal is awarded contract on the terms offered by the highest tenderer and if he declines, then the contract is awarded to the highest tenderer. Thus, there is complete transparency and no prejudice is caused to any one by following the Swiss Challenge Method.

22. Learned counsel for the respondents further contend that the National Urban Housing and Habitat Policy, 2007 has strongly recommended for strong partnerships between Public/Private/Co-operative Sectors for the accelerated growth in the Housing Sector and sustainable development of habitats. One of the objectives of the Housing Policy recently finalised by the Government of Maharashtra is to de-regulate the housing sector and encourage competition and public private partnerships in financing, construction and maintenance of houses for low income groups of weaker sections of the society. Accordingly, it is submitted that awarding contract under the joint venture project by following Swiss Challenge Method cannot be faulted.

23. We have carefully considered the rival submissions.

24. It is well established in law that in the matter of inviting tenders and awarding Government contracts, public interest is of paramount consideration and even in policy matters the Courts by applying the doctrine of proportionality can intervene in the matter, if the policy decision is found to be arbitrary or

discriminatory. The Apex Court in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, has summed up the legal position (in para 10) as follows :

...We may sum up the legal position thus:

- (i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest,
- (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.
- (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

Thus, in the matter of awarding Government contracts, the doctrine of "level playing field" plays an important role. Article 14 of the Constitution applies even in contractual matters and where the policy decision of the Government in contractual matters suffers from the vice of fairness or reasonableness, then such an act or decision would be unconstitutional.

25. Recently, this Court in the case of Vijay Kumar Gupta, Sanjay Transport Service, Well Water Suppliers Vs. State of Maharashtra, School Education and Sports Department, Lirin Roadlines Private Limited and The Hon'ble Minister of Sports, Govt. of Maharashtra, Department of Education, Cultural Affairs and Sports, , after considering the entire case law on the subject held thus:-

6.4 The scope of judicial review in public contracts or such actions of the State is limited and it is a settled rule that the judicial review will be concerned in reviewing not the merits of the decision made but the decision making process itself. If the contract by State or its instrumentalities has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into the contract. If the Court is of the opinion that public interest has been made to suffer then it would interfere in the larger interest of public. Another facet of this is the legitimate expectation of the persons who claim to be interested or similarly situated is that where persons are legitimately entitled to expect that certain entitlements would continue with them, but they are not continued. The Courts insist that the decision affecting such expectation should be taken after giving to such persons an opportunity of being heard. There must exist good and even compelling circumstances to justify exclusion of all other eligible persons. The legitimacy of expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. In other words, the orders and decisions in such commercial field would be tested by the touchstone of fairness in executive action and exceptions

may be there where larger public interest may outweigh the legitimate expectation of the public at large.

26. Applying the above yardsticks, the question to be considered herein is, whether the public tender invited by the Government by invoking the "Swiss Challenge Method" with a view to confer preferential treatment to the respondent No. 7 is unfair and unreasonable ?

27. The explanation given by the State for conferring the preferential treatment is that, the respondent No. 7 had submitted an innovative proposal for development of the government lands which was found to be technically and financially viable. In fact, in the present case, the respondent No. 7 had only approached the Hon"ble Chief Minister on 25-8-2006 with a proposal to develop the said lands belonging to MHADA. The said proposal did not contain any innovative development plan for development of the government lands as contended by the State and the respondent No. 7 had only quantified the balance potential available in respect of the said lands and further expressed his willingness to develop the said lands at his own cost by offering certain constructed area in the form of units for allotment to MHADA free of costs.

28. Thus, in the original proposal given by the respondent No. 7, apart from quantifying the balance potential available on the said lands and the saleable area which the respondent No. 7 was willing to offer to MHADA free of cost for permitting him to develop the said lands, there is nothing on record to show that the respondent No. 7 had submitted any development plan in respect of the said lands, which could be considered by the governmental authorities as innovative or something special so as to confer preferential treatment to the respondent No. 7.

29. Determining the balance potential available on the government lands is an obligation to be discharged by the governmental authorities. Where any private developer quantifies the balance potential available in respect of the government lands or for that matter even on private lands, it is the duty of the governmental authorities to minutely verify the same and arrive at a conclusion as to whether the balance potential computed by the said private developer is in accordance with law or not. Therefore, the fact that the respondent No. 7 had quantified the balance potential available on the said lands, could not be a ground to treat him differently from other private developers. Consequently, conferring preferential treatment to the respondent No. 7 on the ground that he has quantified the balance potential available on the said lands amounts to treating the equals unequally which is not permissible in law.

30. Nowhere in the public tender issued on 20-5-2007 it is stated that the development of the said lands under the joint venture project has to be as per the project report submitted by the respondent No. 7. On the contrary, in the tender dated 20-5-2007 it is specifically stated that the tenderer has to do the work of planning, design, actual construction with the co-operation and advice of

MHADA by obtaining necessary permission from the concerned authorities. Thus, it is clear that the respondent No. 7 had not submitted any development plan which could be considered to be innovative and consequently, granting preferential treatment in such a case to the respondent No. 7 as originator of the innovative proposal is wholly unjustified.

31. Similarly, the fact that the respondent No. 7 had offered free saleable area for development of the government lands could not be a ground for conferring preferential treatment to the respondent No. 7, because, firstly, offering free saleable area for development of the government lands cannot be said to be innovative and secondly, if the contract is to be awarded at the most competitive bid received on issuance of the public tender, then, there is no reason as to why preferential treatment should be given to the respondent No. 7. In other words, where the policy decision of the Government is to award contracts for development of the government lands on the basis of the free saleable area made available to the government, then, every tenderer would have to be given a fair opportunity to bag the contract by offering a most competitive bid and in such a case, conferring preferential treatment to any particular tenderer would be wholly unfair, unreasonable, discriminatory and violative of Article 14 of the Constitution.

32. In the absence of any innovative proposal, it is evident that in the present case, the only reason for granting preferential treatment to the respondent No. 7 is because he had approached the Hon"ble Chief Minister with a request to permit him to develop the said lands. Approaching the Hon"ble Chief Minister or any other Governmental authorities with a proposal for development of the lands belonging to the Government cannot be said to be innovative proposal so as to grant preferential treatment to such a person. It is not the case of the Government that private developers were called upon to submit innovative proposals for development of the government lands and that the respondent No. 7 was the first one to approach the Hon"ble Chief Minister with his innovative proposal. Therefore, granting preferential treatment to the respondent No. 7 merely because he has approached the Hon"ble Chief Minister would be opposed to rule of law. It cannot be said that the persons approaching the governmental authorities form a distinct class so as to avail preferential treatment.

33. The argument of the State that the Government has not suffered any loss by awarding the contract to the respondent No. 7 is without any merit because, firstly, there is every possibility that many genuine tenderers may not have participated in the tender with their competitive bid on account of the preferential treatment sought to be given to the respondent No. 7 in the public tender issued on 20-5-2007. Secondly, in the present case, the highest tenderer was willing to raise his bid further however, he was not permitted and only the respondent No. 7 was permitted to raise his bid. Thus, it is crystal clear that the Government has suffered financially by invoking the Swiss Challenge Method.

34. The argument advanced on behalf of the respondents that the petition

suffers from delay and laches is also without any merit, because admittedly the contract was awarded to the respondent No. 7 on 22-11-2007 whereas PIL No. 72 of 2007 was filed on 4-9-2007 that is much before the contract was awarded to the respondent No. 7. Moreover, once it is held that the action of the governmental authorities in inviting public tender on 20-5-2007 by invoking Swiss Challenge Method suffers from the vice of arbitrariness and unreasonableness, any action taken pursuant thereto is liable to be struck down. Therefore, the decision of the governmental authorities in granting preferential treatment to the respondent No. 7 which is neither in public interest nor fair or reasonable cannot be sustained.

35. For all the aforesaid reasons, we hold that inviting public tender on 20-5-2007 for development of the Government lands by invoking the Swiss Challenge Method, with a view to confer preferential treatment to the respondent No. 7 was wholly unfair, unreasonable, arbitrary, illegal and contrary to law. Consequently, the contract awarded to the respondent No. 7 on 22-11-2007 pursuant to the public notice dated 20-5-2007 is liable to be quashed and set aside. The respondent No. 7 cannot claim any equity in respect of any steps taken during the pendency of the Writ Petition because even before final decision to award the contract to the respondent No. 7 was taken, this Court in PIL No. 72 of 2007 had passed an order on 18-10-2007 to the effect that the respondent No. 7 shall not claim any equity in the matter on account of any steps taken in the matter

36. In the result, both the Petitions are allowed. Rule is made absolute in the above terms with no order as to costs. The governmental authorities are directed to award the contract in respect of the lands in question in accordance with law.