

Mega Enterprises and ors. Vs. State of Maharashtra and ors.

Mega Enterprises and ors. Vs. State of Maharashtra and ors.

SooperKanoon Citation : sooperkanoon.com/360398

Court : Mumbai

Decided On : Feb-06-2007

Reported in : AIR2007Bom156; 2007(2)ALLMR547; 2007(4)BomCR732; 2008(1)CTLJ120(Bom)

Judge : Hardas P.V. and ;Borkar P.R., JJ.

Acts : Bombay Provincial Municipal Corporations Act, 1949 - Sections 73;
[Constitution of India](#) - Article 14

Appeal No. : Writ Petition Nos. 607, 623 and 624 of 2007

Appellant : Mega Enterprises and ors.

Respondent : State of Maharashtra and ors.

Advocate for Def. : P.M. Shinde, A.G.P. for Respondent No. 1 in W.P. No. 607 and 624/2007, ;B.L. Sagar Killarikar, Adv. for Respondent No. 2, ;V.H. Dighe, AGP for Respondent No. 1 in W.P. No. 623/2007 and ;Girish Kulkarn

Advocate for Pet/Ap. : R.N. Dhorde and ;R.L. Kute, Adv. in W.P. No. 607/2007, ;P.M. Shah, Sr. Adv. and ;S.P. Shah and ;Mukul Kulkarni, Adv. in W.P. No. 624/2007 and ;N.B. Suryawanshi, Adv. in W.P. No. 623/2007

Disposition : Petition dismissed

Judgement :

1. Since all these petitions raise a common question, all these petitions are being decided by this common order. These petitions have been filed by the petitioners questioning the terms of the notice inviting tender, dated 22-1-2007 and in particular Clause 3 and Clause 6. In order to appreciate the submissions which are advanced by the learned Counsel appearing on behalf of the respective parties, it would be useful to reproduce Clause No. 3 and 6 of the aforesaid tender notice:

3. Money Earnest Money : Unless the earnest money of Rs. 2,00,18,000/- (Rupees Two Crore Eighteen Lakh only) through pay order or DD of Nationalized Bank or Scheduled Bank in favour of Aurangabad Municipal Corporation is paid, the tender form will not be issued.

6. ELIGIBILITY : The bidder/s shall have experience of minimum one year of collection of octroi of 50 per cent of amount of the estimated offer of realization, and the bidders shall have executed the tender for one full year. The certificate to this effect should have been issued by the Municipal Commissioner or the competent authority.

2. At this juncture we may point out that a similar challenge had been raised earlier before us in Writ Petition No. 177 of 2007 and by our order dated 15.1.2007 we had dismissed the aforesaid petition in limine. We are informed by Mr. B.L. Sagar Killariker, learned Counsel appearing on behalf of the respondent Municipal Corporation that the Special Leave Petition filed by the unsuccessful petitioner in the said petition has been dismissed by the Supreme Court on 5th February, 2007.

3. The aforesaid conditions, namely, Clause 3 and Clause 6 are being challenged before us on the ground that the aforesaid conditions are arbitrary, discriminatory, mala fide and insertion of these conditions is actuated by bias. We have heard Mr. P.M. Shah, learned Senior Counsel appearing in Writ Petition No. 624 of 2007, Mr. R.N. Dhorde, learned Counsel appearing in Writ Petition No. 607 of 2007 and Mr. Suryawanshi, learned Counsel appearing in Writ Petition No. 623 of 2007. Writ Petition No. 607 of 2007 and Writ Petition No. 624 of 2007 have been filed by the unsuccessful tenderer whose tenders have not been accepted by the respondent Municipal Corporation. Writ Petition No. 623 of 2007 has been filed principally in public interest questioning the aforesaid conditions in the tender notice on the

ground that by virtue of the said conditions in the tender notice, the respondent Municipal Corporation is being deprived off of the sizable amount of money.

4. The tender of the petitioner in Writ Petition No. 607 of 2007 and 624 of 2007 was not considered by the respondents as the petitioners did not fulfil the eligibility criteria which is prescribed by virtue of the said conditions. By virtue of the said conditions, it is prescribed that a bidder should have experience of one year of collection of octroi of 50 per cent amount of the estimated offer of realization and the bidders ought to have executed the tender for one full year. It was also the requirement of Clause 6 that a certificate to this effect should have been issued by the Municipal Commissioner or the competent authority. Obviously, according to the petitioners in the said two writ petitions, they have not executed a contract in respect of 50 per cent of the amount of the estimated offer of realization prior to the issuance of the present tender notice. A similar notice inviting tender had been issued some time in December, 2006 and the present two petitioners had submitted their tenders. For reasons which are not germane for the decision of this petition the aforesaid tender notice came to be recalled and a fresh tender notice has been issued. In response to the earlier tender notice, the petitioners, though realizing that they were not eligible, had also submitted their bids. In the present case also the petitioners though realizing that they were not eligible had submitted their bids.

5. Mr. Dhorde, learned Counsel appearing on behalf of the petitioner in Writ Petition No. 607 of 2007, Mr. P.M. Shah, learned Senior Counsel appearing in Writ Petition No. 624 of 2007 have urged before us that the said condition which is incorporated in the tender notice particularly condition prescribing the eligibility criteria is arbitrary, unjust, unreasonable as the aforesaid condition shuts out all other competitors. It is also urged before us that there is absolutely no nexus in incorporating this condition with the object which is sought to be achieved. It is also urged before us that the purpose of issuing tenders would stand defeated if other competitors are kept out and as a result the aforesaid condition is a tailor made condition which would suit the eligibility of respondent No. 4. According to the petitioners, respondent No. 4 was the successful tenderer who had been awarded the contract for the previous year and therefore this condition has been

incorporated in order to suit him and therefore the respondents are favouring respondent No. 4. It is also urged before us that such a condition had not been incorporated in the tender notice which had been issued in respect of award of contract for the previous year and this condition has been incorporated only in respect of the tender notice which has been issued for this year. According to the learned Counsel for the petitioners, since this condition is an arbitrary condition and which has been incorporated in order to favour the respondent No. 4, the said condition is also mala fide condition. There is no requirement in any of the Statutes which provide for the imposition of such a condition. Moreover, it is also urged before us that by imposing such a condition the respondents have demonstrated the total non application of mind and there was no material before the Commissioner for imposing such a condition in the notice inviting tender. According to the learned Counsel for the petitioners, the fact whether a contractor has the experience of one year of collection of octroi of 50 per cent amount is not germane for awarding of the contract. It was also urged before us that neither the reply which has been tendered on behalf of the respondent Municipal Corporation nor the document nor the tender notice disclose that any expert body had been consulted prior to incorporating such a condition in the tender notice. It is also urged before us that by virtue of this condition contractors like the petitioners stand disqualified and as a result of this disqualification the competition is reduced and such reduction in the competition is counter productive to the purpose of issuance of the tender. It was also urged before us by Shri Shah, learned Senior Counsel appearing on behalf of the petitioner in Writ Petition No. 624 of 2007 that the Commissioner on his own could not have issued the tender notice incorporating such a condition without prior sanction or approval from the respondent Municipal Corporation/Standing Committee.

6. Countering the submission of the petitioners, it is urged before us by the learned Counsel for respondents that the present petitions are an attempt at reopening the issue which already stand concluded by virtue of our earlier order referred to above and which order now stands confirmed by the Supreme Court by the dismissal of the Special Leave Petition which was filed by the unsuccessful petitioner therein. It is also urged before us that the challenges which have been raised in the present petition were similar to the challenges which had been raised

in the earlier petition. It is also urged before us that the petitioners particularly the two petitioners who had submitted their tenders were not eligible and at the behest of ineligible tenderer the tender conditions cannot be questioned particularly when the petitioners had submitted their tenders without any demur and it is only after the tender of respondent No. 4 was favourably considered and recommended for being considered by the Standing Committee that the present petitions have been filed. It is also urged before us that this is dishonest exercise undertaken by the petitioners for stalling the consideration of the tender of 4th respondent.

7. Mr. Dhorde, learned Counsel appearing on behalf of the petitioner in Writ Petition No. 607 of 2007 has specifically urged before us that the rates quoted by the petitioner in Writ Petition No. 607 of 2007 and petitioner in Writ Petition No. 624 of 2007 are much higher than the rates which have been quoted by the 4th respondent and by acceptance of the tender of respondent No. 4, the respondent Municipal Corporation stands to be put to great financial loss and the loss could be to the tune of Rs. 4 to 5 Crores.

8. This Court had examined the challenges which had been raised in the Writ Petition No. 177 of 2007. This Court recorded a finding that the aforesaid tender conditions were not found by this Court to be either arbitrary, discriminatory, mala fide or actuated with bias. In the light of that therefore this Court dismissed the petition. We are informed by the learned Counsel representing the respondent Corporation that the challenge of the unsuccessful petitioner therein also met with the similar fate in the dismissal of the Special Leave Petition filed by him before the Supreme Court. At this stage, a reference may usefully be made to the judgment of the Supreme Court in Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors. : AIR 2004 SC1962 . In the aforesaid judgment it was urged before the Supreme Court that the condition of the NCT which require a turnover of at least 20 crores did not have nexus with the object which was sought to be achieved. Before the Supreme Court it was also urged that the aforesaid term was arbitrary and appear to have been incorporated solely with an intent to to deprive a large number of companies imparting computer education from bidding and monopolize the same for big companies. The High Court had allowed the aforesaid writ petition and the same came to be challenged before the Supreme

Court. The Supreme Court in the light of the aforesaid challenges has observed and held as under:

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various Government/Government aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-2003, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 Crores the competent authority took a decision after consulting the technical advisory committee for finalization of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criteria of turnover of Rs. 20 Crores to enable the companies with real competence having financial stability and capacity to participate in the tender particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went upto Rs. 40-50 crores. The total cost of the project was more than 100 crores. A company having

a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

9. It would thus be seen that it was for the authority to set the terms of the tender and the courts would not interfere with the terms of the tender notice unless it was shown to be arbitrary or discriminatory or actuated by malice. In the present case, no doubt by virtue of the aforesaid conditions for some competitors the door of submitting the tender is completely shut. However, the wisdom or the sagacity of the authority in imposing this condition cannot be questioned in a Writ Petition unless it is pointed out that the aforesaid condition is arbitrary or discriminatory. In other words, the terms of the notice inviting tender are not open for judicial review unless they offend Article 14 of the [Constitution of India](#). In the present case, the authorities in their wisdom have incorporated this condition which specifies certain conditions in respect of eligibility. Only persons having requisite experience can submit a tender in response to the aforesaid tender notice. It would not be open for this Court to sit in judgment over the incorporation of such a condition and it would also not be open for this Court to examine the correctness of the incorporation of such a term nor can such a term be examined in the sense that the experience which is sought that is 50 per cent collection of the estimated offer of realization should be modulated and should be either for 20 per cent or 30 per cent or 40 per cent. Even by such substitution or modulation, certain other persons are bound to be left out of consideration. This term therefore, according to us, is neither

arbitrary nor discriminatory nor is the said term unreasonable.

10. It was also urged before us that the aforesaid condition is a tailor-made condition which suits only respondent No. 4 and none of the other tenderer who had submitted their tender. It is also urged before us that such a term had not been incorporated in the tender notice which had been issued for the previous year. It is true that in the tender notice which had been issued for the previous year, such a term had not been incorporated. We were informed at the Bar that previous year was the first year in which the collection of octroi had been awarded to a contractor. This year the authorities in their wisdom, thought it fit to impose certain eligibility conditions and merely because the respondent No. 4 happens to be one who is eligible, it cannot be urged before us that this is a condition which is a tailor-made condition to suit respondent No. 4 only. In any event, the allegations of malice or mala fides are extremely weak and the aforesaid condition cannot be struck down only on the basis of such pleadings.

11. It was urged before us by the learned Counsel for the petitioner by relying on section 73 of the Bombay Provincial Municipal Corporations Act, 1949 and the other provisions of the Act that before a tender notice is issued by the Commissioner it was incumbent for him to obtain sanction of the Committee. In other words, it is urged before us that the Commissioner ought to have obtained approval of the draft of the tender notice from the competent authorities. It has been informed to us that the Commissioner has not issued any work order in the sense there is no concluded contract between the respondent corporation and the respondent No. 4. The Commissioner has virtually acted like a Selection Committee and after scrutinizing the tender of 4th respondent has placed the tender of the 4th respondent for appropriate consideration before the Standing Committee. We are further informed that the Standing Committee was scheduled to meet today in the afternoon and would then be examining the acceptance of the tender of 4th respondent. Therefore, according to us, the submission of the learned Counsel appearing on behalf of the petitioners that the Commissioner was incompetent or did not have the necessary jurisdiction to issue the tender notice does not impress us. In any event, similar tender notice had been issued earlier and the petitioners had submitted their tenders without any demur knowing fully

well that the petitioners were ineligible. In response to the present tender notice, petitioners had also submitted their tender without any demur realizing that they were not eligible to submit their tender. It is only after the tender of 4th respondent has been approved by the Commissioner and has been placed before the Standing Committee for consideration that the present petitions have been filed. In any event, such a challenge is not open to be made on behalf of the tenderer who by virtue of the said provision were ineligible.

12. Both the petitioners who had submitted their tenders and whose tenders were not considered favourably by the respondents on account of the fact of ineligibility were primarily not eligible to submit their tenders. It is no doubt true that tenders of only two persons were found to be eligible. That by itself would not be a reason to hold that the terms are either discriminatory, arbitrary, mala fide or actuated by malice. Our attention was invited by the learned Counsel appearing on behalf of the petitioner to a recent judgment of the Supreme Court in *Noble Resources Limited v. State of Orissa* : AIR 2007 SC119 . Mr. Dhorde, learned Counsel appearing on behalf of the petitioner has placed strong reliance on the observations of the Supreme Court in para Nos. 27, 28 and 30. In paragraph No. 28 the Supreme Court has observed thus:

28. Although the scope of judicial review or the development of law in this field has been noticed hereinbefore particularly in the light of the decision of this Court in *ABL International Ltd. and Anr. v. Export Credit Guarantee Corporation of India Ltd.* : (2004)3SCC553 , each case, however, must be decided on its own facts. Public interest as noticed hereinbefore, may be one of the factors to exercise power of judicial review. In a case where a public law element is involved, judicial review may be permissible.

The Supreme Court thereafter has observed that in contractual matters, the terms of invitation to tender may not be open to judicial scrutiny but the courts can scrutinize the award of contract by the Government or its agency in exercise of their powers of judicial review to prevent arbitrariness or favouritism. The Supreme Court further observed that public interest may be one of the factor to exercise the powers of judicial review and judicial review is also permissible when mala fides

and ulterior motive is attributed. We have already dealt with the submissions made on behalf of the petitioners in respect of mala fides and ulterior motive and their allegation of incorporation of the aforesaid condition to suite the eligibility of respondent No. 4. In the present case, there is no concluded contract. The tender of respondent No. 4 is yet to be accepted. We are therefore, in this petition not called upon to examine the acceptance of the tender of respondent No. 4 nor the contract with the 4th respondent as the matter is yet to be considered by the Standing Committee. In the present case, we are concerned with the challenge to the aforesaid conditions. The learned Counsel appearing on behalf of the petitioners have not made any submissions in respect of condition No. 3 of the tender notice and have confined their arguments only in respect of the condition No. 6 which is eligibility condition. We, therefore, do not advert to the grounds raised in the petition in respect of condition No. 3 of the tender notice.

13. With the assistance of the learned Counsel appearing on behalf of the respondents, in our considered opinion the present two petitions are wholly misconceived. The submissions was urged before us by the learned Counsel for the petitioners that since the envelope containing the financial bid of the petitioners has not been opened by the respondents on account of finding of ineligibility, the second envelope may be directed to be reopened and placed before the appropriate authorities while considering the tender of 4th respondent. According to the learned Counsel for the petitioners, the bids contained in the envelope of the respective petitioners is much higher than the bid submitted by the respondent No. 4. According to the petitioner, if this course of action is adopted, the respondent corporation stands to benefit in terms of money which otherwise it would be deprived of. The petitioner in Writ Petition No. 607 of 2007 has specifically averred in the petition that the bid submitted by the petitioner is of Rs. 4,09,15,000/- more than the bid submitted by the respondent No. 4. We do not accede to this submission which is advanced before us by the learned Counsel for the petitioner. The terms of the tender notice are explicit in the sense that the financial bid of ineligible tenderer would not be opened. It is obvious if the tenderer is not eligible, the financial bid is not opened nor is it considered. The tenders of the petitioners were rejected at the threshold without opening the financial bid as the petitioners were found to be ineligible. By adopting the course which is suggested by the

petitioner, we would be directing the respondent to do something which is strictly prohibited by the terms of the tender notice.

14. In our considered opinion therefore these petitions fail and are liable to be dismissed. Accordingly Writ Petition Nos. 607 of 2007 and 624 of 2007 are dismissed. Insofar as Writ Petition No. 623 of 2007 is concerned, by this petition which is in public interest, the petitioner has questioned the aforesaid condition on the ground that the financial loss would be caused to the Corporation by limiting the competition. The issues raised in the petition stand fully answered by what has been stated by us in the foregoing paragraphs of this judgment. For the same reasons therefore, Writ Petition No. 623 of 2007 is also dismissed. In the circumstances, there will be no order as to costs.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com