

IN THE BOMBAY CITY CIVIL COURT AT GREATER BOMBAY

NOTICE OF MOTION NO.3479 OF 2015

IN

SHORT CAUSE SUIT NO. 2098 OF 2015

Ornate Housing Pvt. Ltd

.. Plaintiff

Versus

The Abhudaya Nagar Sahakari Gruhanirman

Sansthancha Sangh Ltd. and Ors.

..Defendants.

Mr. Pandit, Advocate for the plaintiff.

Mr. Desai, Advocate for the defendant No.1.

Mr. Bhadang, Advocate for the defendant no.2.

Mr. Kapse, Advocate for the defendant no.3.

Mr. Shripad Murthi, Advocate for the defendant no.4.

CORAM : HIS HONOUR JUDGE SHRI V. V. PATIL

(C.R.NO.02)

:: ORDER ::

[Delivered on 28th October 2015]

1] The plaintiff has filed present suit for declaration that the bid of the defendant no.2 having been disqualified, cannot be considered by the defendant no.1 and their members and to direct the defendant no.1 to comply with the Circular, issued by Government of Maharashtra dated 03/01/2009 while accepting bids.

2] In above suit, the plaintiff has filed draft notice of motion and prayed for ad-interim relief restraining the defendant no.1 from permitting the defendant no.2 to participate in the tender process during pendency of the suit.

3] In short, it is the case of plaintiff that the plaintiff is a Private Limited Company registered under the provisions of Companies Act. The defendant no.1 is a Federation of Co-operative Housing Societies, situated at Abhyuday Nagar, Kalachowki, Mumbai comprising of 48 Co-operative Housing Societies. The defendant no.2 is a Private Limited Company registered under the provisions of Companies Act, 1956. The defendant no.3 is a registered partnership firm having its principal place of business at the address mentioned in the cause title. The defendant no.4 joined as third party is also a Co-operative Housing Society.

4] It is stated that the defendant no.1 for the purpose of collective redevelopment of its Co-operative Housing Society issued a public notice dated 24/08/2014 and invited bids from the members of the public. Pursuant to the issuance of the aforesaid notice the plaintiff by its letter dated 09/09/2014 requested the defendant no.1 to issue the tender document on payment of Rs. 1,00,000/-. Accordingly the defendant no.1 by its letter dated 09/09/2014 handed over tender document to the plaintiff's representative. The tender document issued by defendant no.1 relates to the redevelopment of the plot of land bearing C.S.No.6/148 of Parel Division located in F/S Ward of Village Parel-Sewree admeasuring 1,33,593.88 sq.mts. the total number of buildings comprise of 3238 residential units and 172 non-residential units. The tender document contains details of 48 registered Co-operative Housing Societies alongwith number of units in each building of the respective.

5] It is stated that the plaintiff prepared their bid and submitted the same on 09/10/2014 along with earnest amount of Rs.5,00,00,000/- [Rs.Five crore] . The defendant no.1 issued receipt in respect thereof in favour of plaintiff. It is stated that seven parties including the plaintiff have submitted their bids. One of the bidder is the defendant no.2. The bid submitted by three of the seven bidders i] Neptune Ventures and Developers, ii] Shreepati build infra investment Ltd. and iii] Ravijyot Development builders and Developers have been rejected for non-compliance of terms of tender document regarding earnest money.

6] According to plaintiff, the defendant no.3 is a Project Management Consultant [in short 'PMC'] of the defendant no.1. The defendant no.3 by its letter dated 05/11/2014 informed the plaintiff that the bids of M/s. Dynamix Reality, the plaintiff, the defendant no.2 and Omkar Realtors and Developers Pvt. Ltd were shortlisted. By the said letter the defendant no.3 requested the plaintiff to make a presentation to the members of the plaintiff's society on 12/11/2014 .

7] The PMC expressly stated that the presentation must be strictly in accordance/consonance with the bid offer submitted by the plaintiff, failing which the plaintiff's bid shall be immediately disqualified. Accordingly, the plaintiff representatives made a presentation to the members of defendant no.1 society.

8] Meanwhile the defendant no.1 advocate by their letter dated 28/03/2015 informed the plaintiff that the individual member societies are in the process of conducting the elections of their Managing Committee and requested the plaintiff to extend the validity period of the bid for a further

period of 180 days. Accordingly the plaintiff extended the bid upto 08/04/2015.

9] In third week of July 2015 the plaintiff came across a copy of unsigned letter dated 03/07/2015 issued by the defendant no.2 to defendant no.1. Perusal of this letter reveals that the defendant no.2 had requested the defendant no.1 and sought permission to show their projects to the occupants of the defendant no.1 society which would enable them to appreciate the construction work and projects undertaken by them. The plaintiff was shocked to come across such letter as the same was in breach and violation of the tender terms and conditions i.e. clause 27. Thereafter the plaintiff made further inquiries with the office bearers of defendant no.1 regarding details of the bids submitted to the defendant no.1 and shocked to find that the defendant no.2 made a conditional bid in violation of terms and conditions of the tender conditions. The defendant no.2 offered to provide 531.78 sq.ft. carpet area + 50 sq.ft. carpet area (subject to approval of MHADA). According to plaintiff a conditional offer is in clear breach of condition nos.17 and 20 of the tender document. Thereafter the plaintiff's advocate by his letter dated 21/07/2015 addressed a letter to defendant no.1 and raised objection with regard to the acceptance of a conditional bid of the defendant no.2 by it. The copies of the said letter were also sent to the defendant no.3 and Mr. Prashant Karande, the legal advisor of the defendant no.1. Thereafter it was awaiting the response from the defendant nos.1 and 3 on the objection as raised. However, the plaintiff did not receive any reply from the defendant no.1. Upon enquiry plaintiff learnt that the defendant no.3 by its letter dated 02/08/2015 written to the legal advisor of defendant no.1 and sought his legal opinion in respect of objection raised by the plaintiff. The legal advisor of defendant no.1 replied to defendant no.3 by its letter dated 14/08/2015 stating that he has

perused the objection of plaintiff, the bid of defendant no.2 and the tender document. According to him the bid of defendant no.2 is a conditional offer and the same is liable to be rejected. The legal advisor requested the defendant no.3 to take note of the aforesaid opinion and proceed with the matter as per the terms of the tender. The defendant no.3 clarified that even though defendant no.2 had been initially shortlisted, considering that it has submitted a conditional bid, the bid of defendant no.2 is rejected. The defendant no.3 by its letter dated 21/08/2015 informed the defendant no.1 and its member about rejection of the tender of the defendant no.2.

10] Despite the express rejection of the bid of defendant no.2, the defendant no.1 without even considering the issue that the bid of defendant no.2 is conditional, violative of the terms of the tender, by its letter dated 23/08/2015 written to its member society stating that they are rejecting the decision of the defendant no.3 of rejection of the bid of defendant no.2. The reasoning of the defendant no.1 was that the defendant no.3 has traveled beyond its power and have no right to terminate the bid of the defendant no.2.

11] It is stated that the circular issued by Government of Maharashtra on dated 03/01/2009 is a binding notification and which expressly provides, that PMC has to scrutinize all the bids and select the shortlisted bids. Hence it is the sole authority and obligation of defendant no.3 to shortlist the bidders, if the same found contrary to the terms of tender.

12] According to plaintiff, the defendant no.2 has already being disqualified as a bidder as he violated terms of the tender, the defendant no.1 ignoring rejection of tender of defendant no.3 bent upon to accept the defendant no.2 as a valid bidder and permitting the defendant no.2 to

participate in the tender process. Thus it is stated that the act on the part of defendant no.1 accepting the defendant no.2 and permitting it to participate in tender process is illegal and it is necessary to direct the defendant no.1 not to consider the bid of defendant no.2 or permit the defendant no.2 to participate in the tender process.

13] The defendant no.1,2 and 4 filed reply to the notice of motion separately and objected the same on the ground that the suit filed by plaintiff is premature. It is further contended that as the plaintiff failed to issue notice u/s. 164 of Co-operative Housing Societies Act before filing suit against defendant no.1 the suit is not maintainable and fit to be dismissed at its threshold. It is stated that the defendant no.3 without consulting the defendant no.1 society and without any authority sent letter to defendant no.2 rejecting his tender. The defendant no.1 society immediately after receipt of letter of defendant no.3 sent a letter on 21/08/2015 to defendant no.3 informing that he has no right to reject the tender of defendant no.2. It is stated that the members of General Body of defendant no.1 only are empowered to select their developer and not the defendant no.3. With these submissions the defendant no.1,2 and 4 prayed to reject the ad-interim relief.

14] The defendant no.3 has not filed reply to the notice of motion.

15] Heard both the sides. Following points arise for my determination and I record my findings thereupon as under for the reasons given below.

Points

- 1] Whether plaintiff has made out a prima facie case for grant of ad-interim relief ?
- 2] What order ?

Findings.

No

As per final order.

:: Reasons ::**Points No.1 :-**

16] The plaintiff in support of its contentions has relied upon copy of tender document, copy of plaintiff's letter dated 09/10/2014, copy of defendant no.1's letter dated 11/10/2014, copy of PMC's letter dated 05/11/2014, copy of letter dated 03/07/2015, copy of the bid submitted by defendant no.2, copy of plaintiff's advocate letter dated 21/07/2015, copy of letter dated 02/09/2015, copy of letter dated 21/08/2015 from defendant no. 3 to defendant no.1, copy of letter dated 02/08/2015 from defendant no.3 to legal advisor, copy of Annexure-II of the offer submitted by defendant no.2. Copy of legal opinion dated 14/08/2015, copy of letter dated 21/08/2015 issued by defendant nos.3 to defendant no.2, copy of circular dated 03/01/2009.

17] The learned Counsel of plaintiff argued at length. According to him, the defendant no.3 PMC is the only authority who is entitled to shortlist the bidders. According to him when the defendant no.3 has found that the bid submitted by defendant no.2 is violating terms and conditions of the tender, it has sought opinion from the legal advisor of defendant no.1. After seeking legal advise from legal advisor of defendant no.1, the defendant no.3 rejected the tender of defendant no.2 and informed this fact to defendant no.1 by its letter. He carried me through the prima facie documentary evidence produced on record. Firstly he invited my attention towards the tender which is produced on record. According to him the clause no.17 of the tender demonstrates that "bid offer shall be firm and shall not be subjected to any escalation / variation, condition". He further invited my attention towards

clause no.20 and argued that the conditional bid offer of the defendant no.2 is liable to be rejected. By relying upon these two clauses the learned Counsel for plaintiff submits that the tender submitted by defendant no.2 is contravening these two important conditions of the tender so the same can not be accepted by the defendant no.1. He further invited my attention towards Government circular dated 03/01/2009 and argued that as per the circular the defendant no.2 has acted and rightly rejected the tender of defendant no.2. He submits that when the defendant no.3 has rejected the tender of defendant no.2, the defendant no.1 is having no legal rights to inform the defendant no.2 to participate in the tender process. According to him as defendant no.2 is already disqualified, he is not entitled to participate in the tender process.

18] The learned Counsel for plaintiff further invited my attention towards letter dated 03/07/2015 issued by defendant no.2 in favour of defendant no.1 wherein the defendant no.2 has requested the defendant no.1 to inspect the projects completed by defendant no.2 in past. This letter is in violation of clause no.17 and 20 of the tender document. He further invited my attention towards the Annexure-II of defendant no.2 and urged that the defendant no.2 in remarks column of Annexure-II has mentioned that the offer made by him i.e. 531.78 = 582 sq.ft. is subject to approval from MHADA. By relying upon this clause the learned Counsel for plaintiff argued that this offer is conditional offer and therefore the defendant no.3 has rightly rejected this tender. He submits that as defendant no.1 is permitting the defendant no.2 to participate in tender process it is necessary to restrain him during pendency of suit from participating defendant no.2 in the tender process. In support of his submission he relied upon 2011[2] Bom.C.R.235 **Bharat Biotech vs. Directorate of Medical Education** wherein it is held that Tender approval committee concluded second respondent was not qualified, committee decided

to award contract to second respondent only because bid was lowest. Reasons weighed with committee are arbitrary and ultra vires tendering process and conditions. Petitioner entitled to succeed. Decision of committee quashed and set aside. In event of fresh tender being floated, all parties including second respondent to participate in tender.

19] As against this the learned Counsel for defendant nos.1, 2 and 4 submits that the defendant no.3 was having no legal rights to cancel the bid of defendant no.2. The acceptance or rejection of bid is the powers vested in the General Body members of defendant no.1 and not upon any other authority. The learned Counsel for defendant nos.1, 2 and 4 carried me through the Government circular and submitted that the defendant no.3, plaintiff and the legal advisor of defendant no.1 in collusion with each other acted and got issued letter from defendant no.3 rejecting the tender of defendant no.2. According to them, the defendant no.3 is only entitled to advice the defendant no.1 in the redevelopment process and he can not travel from his limit. Thus the learned Counsel for defendant nos.1, 2 and 4 prayed to reject the ad-interim relief.

20] The learned Counsel for defendant no.3, submits that the defendant no.3 is empowered to select the bidder. According to him the defendant no.3 has rightly rejected the bid of defendant no.2 as the same is in violation of tender condition. Thus he prayed to pass appropriate order.

21] I have considered the submissions advanced by both the sides carefully and minutely gone through the prima facie documentary evidence produced on record by plaintiff. At the very outset it is necessary to scrutinize the tender document which is placed at Exh.A. After going through this

document it reveals that the powers of acceptance or rejection of a tender are vested with Abhudaya Nagar Sahakari Gruhanirman Sansthanca Sangh Ltd. and its members. The page no.3 of this tender document further demonstrates that the defendant no.1 Abhudaya Nagar Sahakari Gruhanirman Sansthanca Sangh Ltd and its member of Co-operative Housing Societies reserved the right to reject any of bid offers without assigning any reasons whatsoever.

22] The page no.43 of the tender goes to show that the defendant no.3 [PMC] was only authorized to present the shortlisted bidders and the bid offers to the Abhudaya Nagar Sahakari Gruhanirman Sansthanca Sangh Ltd as provided u/s.79 (A) of the Co-operative Housing Society Act and to keep the same in the General Body meeting of defendant no.1 who would decide to whom the redevelopment work of the defendant no.1 should be allowed.

23] I have also considered clause nos.17 and 20 of the tender. Though the learned Counsel of plaintiff vehemently argued that the clause no.17 and 20 of the tender are the conditions. However I am not inclined to accept this prepositions because these clause nos.17 and 20 are not the conditions of tender but they are simply instructions to the bidder viz how to fill up their tender and to submit the same with defendant no.1. It is nowhere stipulated that the clause no.17 and 20 are mandatory and are binding upon the bidders and if there is any violation of it the tender would be rejected. It appears that these clause nos.17 and 20 are directory in nature and not mandatory. In my view assuming for a moment that the defendant no.3 has violated clause no.17 and 20 while filing its tender, it does not mean that the tender submitted by defendant no.2 is invalid and liable to be rejected. Same is the situation of clause no.27 of the tender document. Clause 27 provides that any efforts by a bidder to influence PMC of this project, their personnel, of members may result

in rejection of their bid. The learned Counsel for plaintiff by relying upon this clause invited my attention towards letter issued by defendant no.2 to defendant no.1 dated 03/07/2015. He vehemently argued that in this letter the defendant no.2 has tried to influence the defendant no.1 and its members. However, if the contents of the letter are carefully gone into, it nowhere reveals that by way of this letter the defendant no.2 wanted to influence upon the defendant no.1 or its members. Its recital simply goes to show that the defendant no.2 has requested the defendant no.1 to inspect its projects completed in past and thereafter to take decision to select the bidder. Thus in my considered view only because the defendant no.2 has issued letter on 03/07/2015 requesting defendant no.1 to inspect its completed projects, it does not mean that the defendant no.2 attempted to influence upon defendant no.1 or its member.

24] As far as the Annexure-II of the tender remarks column is concerned, the learned Counsel for plaintiff harped upon this clause and contended that the tender of the defendant no.2 is a conditional offer therefore the tender submitted by him is violative of the conditions of tender. I have given a thoughtful consideration to this submission. If the remarks column of Annexure-II is carefully gone into it nowhere reflects that by way of remark column that defendant no.2 has made any conditional tender. I say so because the defendant no.2 has mentioned in this remark column that the extra 50 sq.ft. area which he want to provide to the members of defendant no.1 is subject to the approval of MHADA, in my view this cannot be a conditional offer, because MHADA who is the owner of the entire property ultimately would take decision about the areas which the developer offering to the members of the defendant no.1, and on this ground the tender submitted by defendant no.2 can not be said as a conditional.

25] Now the crucial question is whether the defendant no.3 which is PMC is authorized to reject the tender of defendant no.2, it appears that the defendant no.3 was appointed by defendant no.1 by an agreement which is placed on record [agreement dated 05/10/2012]. Its clause no.10 goes to show that the defendant no.3 PMC has been authorized to do work of getting sanction of redevelopment, approval of maps, shortlisting of bidders and preparation of its charts and for this work the defendant no.3 has been paid by the defendant no.1. This document nowhere provides that the defendant no.1 had authorized the defendant no.3 to reject or accept any of the bidder particularly when they were shortlisted. Thus the agreement placed on record by plaintiff makes it clear that the defendant no.3 was not authorized to cancel or accept any of the tender submitted by the bidder. It is also to be noted here that in tender which is published by defendant no.1, the defendant no.3 was nowhere authorized to accept or reject the tender of any of the bidder. I say so because, page no.43 of the tender is very clear and goes to show that the General Body members of defendant no.1 only authorized to accept or reject tender of the bidder and not defendant no.3.

26] I have also gone through the circular issued by Government of Maharashtra on 03/01/2009. This circular nowhere speaks that the Architect in redevelopment is authorized to accept or reject tender of any bidder. This circular only provides that the society may follow the advice given by the Architect. The circular nowhere says that the Architect is entitled to accept or reject any of the tender submitted by the bidder. The clause no.9 and 10 of the circular further shows what are the duties of PMC in the redevelopment scheme. In clause no.9 and 10 it nowhere provides that the defendant no.3 has been authorized to accept or reject any of the tender submitted by the bidder.

27] Thus taking into consideration the prima facie documentary evidence placed on record by plaintiff it nowhere reveals that the defendant no.3 is authorized to accept or reject the tender of defendant no.2 or any of the bidder. It prima facie appears that the defendant no.3 in collusion with plaintiff malafidely issued letter and informed the defendant no.2 that its tender has been rejected. This act of defendant no.3 is illegal and the same is not binding upon the defendant no.1 or 2.

28] The record shows that the defendant no.1 has permitted defendant no.2 by issuing letter on 23/08/2015 to participate in the tender process. I have already concluded that the tender submitted by defendant no.2 is according to the tender conditions and not violating any of these conditions therefore in my considered view the defendant no.2 cannot be restrained from participating in the tender process.

29] As far as the law laid down by Hon'ble Bombay High Court in the matter of "Bharat Biotech International Ltd." is concerned, I have gone through the facts of the matter, however, with due respect I hold that the law laid down by Hon'ble Bombay High Court is not applicable to present case as the facts are not similar.

30] Thus I hold that the plaintiff has failed to show prima facie that it has made out case for grant of temporary injunction hence the ad-interim relief claimed by plaintiff can not be allowed. Hence order.

:: Order ::

The ad-interim as prayed by plaintiff is refused

sd/-

Date: 28/10/2015

[V.V.PATIL]
Judge
City Civil Court, Mumbai

"I affirm that the contents of this PDF file order are the same, word to word, as per the original order."

Name of the Steno with post :- Mrs. M. S. Putta (H.G.Stenographer)

- Name of the Judge (with Court no.) :- Shri V.V.Patil, C.R.No.2
- Date of pronouncement of order :- 28/10/2015
- Order signed by the PO. on :- 28/10/2015
- Order uploaded on :- 29/10/2015