

MAHARASHTRA HOUSING DEVELOPMENT AUTHORITY A

v.

SHAPOORJI PALLONJI & COMPANY

PRIVATE LIMITED & ORS.

(Civil Appeal No. 1836 of 2018) B

FEBRUARY 12, 2018

[RANJAN GOGOI AND R. BANUMATHI, JJ.]

Tender – e-Tender – Appellant-Maharashtra Housing Development Authority (MHADA) issued e-Tender notice inviting proposals for work of “Technical designing, coordination and construction....and other various works in respect of redevelopment project” – First respondent-writ petitioner case that it had uploaded its technical and financial bid on the website of the appellant and though it had pressed the ‘freeze button’, it could not get an acknowledgement of the bid submitted – National Informatics Centre (NIC) took the view that there was no technical glitch in the system and in absence of acknowledgement of the submission of the bid by the first respondent, it was not entitled to any consideration of its defective bid – Writ Petition – High Court directed NIC to access the files of the first respondent and make it available to MHADA, which would decrypt the said files and consider the bid documents as a “valid bid” – On appeal, held: Directions issued by the High Court incorrect – NIC which had developed the portal had stated before the Court on affidavit that retrieval of the documents even jointly with MHADA is not feasible or possible – That apart, lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the ‘freeze button’; the generation of acknowledgements in respect of other bidders and the absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid – Directions issued by the High Court in favour of the first respondent virtually confers on the said respondent a second opportunity which cannot be countenanced. C
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A **Allowing the appeal, the Court**

HELD: 1. The first issue that arises for a decision is whether the bid document(s) uploaded by the first respondent – writ petitioner can be retrieved or is irretrievably lost. The second issue is - assuming the bid document(s) submitted by
B **the first respondent is retrievable, whether the first respondent would be entitled to a consideration of the bids submitted by it on merits as has been directed by the High Court. [Para 6][264-F-G]**

2. In the counter affidavit filed by the NIC it has been stated that the bid uploaded by the first respondent was invalid as the representative(s) of the said respondent did not press the ‘freeze button’ which alone would have completed the bid process. In this regard, the NIC has further stated that there was no problem in the server during the relevant time period and as many as 427 bid documents (pertaining to other tenders)
C **were uploaded between 1200 hours to 1300 hours on the said date i.e. 27th July, 2017. The NIC in its affidavit has further stated that if the first respondent had uploaded the documents at 1216 hours on 27th July, 2017 and it had not received the bid submission acknowledgement it still had 44 minutes to contact the NIC for help which help was not sought. In this regard, the NIC has further stated that the first respondent – bidder had participated in e-Tendering in Maharashtra Government portal earlier and thus it was familiar with the entire process. [Para 9][265-F-H]**
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3. The NIC which had developed the portal had stated before the Court on affidavit that retrieval of the documents even jointly with Maharashtra Housing Development Authority is not feasible or possible. That apart, lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the ‘freeze button’; the generation of acknowledgements in respect of other bidders and the absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid and the directions issued by the High Court in favour of the first respondent virtually confers on the said respondent a second opportunity which cannot be countenanced. [Para 10][266-A-D]
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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1836 A
of 2018.

From the Judgment and Order dated 28.09.2017 of the High Court
of Judicature at Bombay in Writ Petition (L) No. 2070 of 2017.

Dushyant Dave, Sr. Adv., Chirag M. Shroff, Ms. Neha Sangwan,
Advs. for the Appellants. B

Atmaram Nadkarni, ASG, Neeraj Kishan Kaul, Mukul Rohatgi,
Sr. Advs. Kunal Vijani, Ms. Padhma Lakshmi Iyenger, Pranaya Goyal,
Kingshuk Banerjee, Dr. Nishesh Sharma, Ms. Seema Bengani,
Merusagar Samantray, Ms. Lhingneivah Gurmeet Singh Makker, Advs.
for the Respondents. C

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. The appellant – Maharashtra Housing Development Authority
through its Chief Officer issued e-Tender notice inviting proposals for
the work of “Technical designing, coordination and construction for
rehabilitation/sale/ commercial/amenities along with construction of
habitable temporary transit camps and other various works in respect of
redevelopment project”. The bidders were to submit their bids in two
stages i.e. technical and financial. They were required to comply with
the experiences and other conditions mentioned in the Request for
Qualification-cum-Request for Proposal (RFQ cum RFP) document.
The last date for submission of on-line bid was fixed on 17th May, 2017
which was subsequently extended from time to time and lastly extended
upto 1300 hours of 27th July, 2017. D
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3. According to the first respondent – writ petitioner, it had uploaded
its technical and financial bid at about 1216 hours on 27th July, 2017 on
the website of the appellant. The first respondent – writ petitioner claimed
that though it had pressed the ‘freeze button’, it could not get an
acknowledgement of the bid submitted. Thereafter, correspondences
were entered into/exchanged between the first respondent and the
appellant whereafter the first respondent was referred to National
Informatics Centre (NIC) which had designed and maintained the e-
portal on which bids were submitted. As the NIC took the view that the
absence of acknowledgement of the submission of the bid by the first
respondent – writ petitioner was on account of its omission to press the
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A ‘freeze button’ and as there was no technical glitch in the system, amply demonstrated by the acknowledgements generated in favour of other bidders, the first respondent – writ petitioner was not entitled to any consideration of its otherwise defective bid. This had led to the filing of writ petition out of which this appeal has arisen wherein the High Court of Bombay by the impugned judgment dated 28th September, 2017 had issued the following directions:

“15. In the aforesaid facts and circumstances, we issue directions to the NIC to access the files containing the bid documents of the petitioners and transfer and/or make it available to respondent no.2 MHADA which would decrypt the said files and consider the bid documents of the petitioners as a “valid bid” with the assistance of the NIC and open the technical bid of the petitioners forthwith since we are conscious of the fact that the learned counsel for the MHADA had made a statement before us on 07.08.2017 that the technical evaluation of the bids is going on and in any case we do not intend to stall the project. If the petitioners bid satisfies the technical conditions, his financial bid can be considered along with the other three bidders who are already in the fray.”

4. It is the aforesaid directions that have been assailed in this appeal by the Maharashtra Housing Development Authority.

5. We have heard Shri Dushyant A. Dave, learned Senior Counsel appearing for the appellant, Shri Neeraj Kishan Kaul, learned Senior Counsel appearing for the first respondent – writ petitioner and Shri A.N.S. Nadkarni, learned ASG appearing for the NIC.

6. The matter lies within a short compass. The first issue that arises for a decision is whether the bid document(s) uploaded by the first respondent – writ petitioner can be retrieved or is irretrievably lost. The second issue is - assuming the bid document(s) submitted by the first respondent is retrievable, whether the first respondent would be entitled to a consideration of the bids submitted by it on merits as has been directed by the High Court.

7. To answer the first issue this Court by order dated 18th January, 2018 has directed the NIC to file an affidavit to answer the following query:

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“Whether the data uploaded by the respondent - bidder – Shapoorji Pallonji & Company Private Limited, receipt of which was not acknowledged on account of his alleged failure to press the ‘Freeze Button’, is irretrievably lost by this time and cannot be retrieved under any circumstance?” A

8. Pursuant to the aforesaid order dated 18th January, 2018 the NIC has filed an affidavit dated 23rd January, 2018 wherein it has been stated that the data uploaded by the first respondent cannot be retrieved by the NIC and Maharashtra Housing Development Authority jointly or severally under any circumstances in the present e-Tendering system with prevailing Government of India Guidelines. In paragraph 7 of the aforesaid affidavit dated 23rd January, 2018 the NIC has also stated as under: B C

“7. As far as NIC is concerned it cannot access the invalid bid documents since it has neither the keys nor the approved process to download the same pertaining to any packet/envelop/cover. Even though keys are available with Maharashtra Housing Development Authority (Petitioner), but even with that keys the bid documents cannot be retrieved at this time as the bid opening event has already been concluded. Thus bid documents cannot be retrieved under any circumstances from the e-Tendering system.” D E

9. The above apart, in the counter affidavit filed by the NIC it has been stated that the bid uploaded by the first respondent was invalid as the representative(s) of the said respondent did not press the ‘freeze button’ which alone would have completed the bid process. In this regard, the NIC has further stated that on 27th July, 2017 there was no problem in the server during the relevant time period and as many as 427 bid documents (pertaining to other tenders) were uploaded between 1200 hours to 1300 hours on the said date i.e. 27th July, 2017. The NIC in its affidavit has further stated that if the first respondent had uploaded the documents at 1216 hours on 27th July, 2017 and it had not received the bid submission acknowledgement it still had 44 minutes to contact the NIC for help which help was not sought. In this regard, the NIC has further stated that the first respondent – bidder had participated in e-Tendering in Maharashtra Government portal earlier and thus it was familiar with the entire process. F G

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- A 10. If the NIC, which had developed the e-portal in which bids were to be submitted and maintenance and upkeep of which was its responsibility, had stated in its affidavit what has been indicated above, we do not see how the repeated statements made on behalf of the first respondent that the bid documents can still be retrieved, if required by traveling beyond the Government of India guidelines, should commend to us for acceptance. The opinion rendered in this regard by the consultant of the first respondent Mr. Arun Omkarlal Gupta on which much stress and reliance has been placed by the first respondent could hardly be determinative of the question in a situation where the NIC which had developed the portal had stated before the Court on affidavit that retrieval of the documents even jointly with Maharashtra Housing Development Authority is not feasible or possible. That apart, lack of any timely response of the first respondent when the system had failed to generate an acknowledgement of the bid documents in a situation where the first respondent claims to have pressed the ‘freeze button’; the generation of acknowledgements in respect of other bidders and the absence of any glitch in the technology would strongly indicate that the bid submitted by the first respondent was not a valid bid and the directions issued by the High Court in favour of the first respondent virtually confers on the said respondent a second opportunity which cannot be countenanced.
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- E 11. In the above view of the matter, we are inclined to take the view that the High Court was not correct in issuing the directions extracted above as contained in paragraph 15 of the impugned judgment/order dated 28th September, 2017. The same are, therefore, interfered with. The appeal is allowed accordingly.