

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 3853/2008**

Date of Decision: 19th May 2008

MITTAL PROCESSORS P.LTD. & ANR Petitioner

Through Mr. Jayant Bhushan, Senior Advocate with
Mr. Amit Kumar, Jay Bansal, Advocates.

versus

MCD Respondent

Through Mr. Ajay Arora & Mr. Kapil Dutta, Advocates.

CORAM:

HON'BLE MR. JUSTICE MUKUL MUDGAL

HON'BLE MR. JUSTICE V.K. SHALI

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| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

% **JUDGMENT**

MUKUL MUDGAL, J. (Oral)

CM No. 72421/2008(exemption)

Allowed, subject to all just exceptions. The application stands disposed of.

W.P.(C) 3853/2008 & CM 74202/2008 (stay)

1. Admit. With the consent of the learned counsel for the parties, this writ petition is taken up for final hearing. This writ petition challenges the notice dated 25th April 2008 issued by the Municipal Corporation of Delhi, inviting tenders for supply of 7,90,736 meters of cloth for uniform of the school children for the year 2008-09. In respect of an earlier tender dated 23rd December, 2004 and pursuant to some investigations made by the CBI by its letter dated 13th March 2006, the following suggestions were made to the MCD which read as follows:

“In view of the above the following suggestions are made for implementation / guidance in case for future purchase of uniform cloth:

1. While framing the tender conditions it may be specified that only bonafide composite textile Mills having the entire manufacturing process under one roof, would be eligible to participate. This will

ensure that only reputed mills participate in the tender and prevent small scale unorganized mills in getting the order.

2. The sample of the cloth to be sent for testing should be clearly specified in consultation with the experts of BIS and the testing to be got done from well reputed, Government approved and NABL accredited laboratories.”

2. The petitioner claims to be a composite textile mill manufacturing the cloth. It was a successful bidder in the last tender floated by the respondents and has also given a bid in pursuance to the tender and notice dated 25th April 2008 which is sought to be challenged in the present writ. The challenge to the aforesaid tender by the petitioner is on the ground that while the second suggestion of the CBI's letter dated 13th May 2006 has indeed been incorporated in the tender conditions by the respondent MCD, the first suggestion which required the restricting of tenders only to the bonafide composite textile mills having the entire manufacturing process under one roof, (so as to prohibit the small scale unorganized mills from bidding) was not accepted.

3. Shri Jayant Bhushan, the learned Senior Counsel appearing for the

petitioner submitted that this Court ought to issue notice and enquire from the respondents at least into the reasons which led to the exclusion of the first suggestion of the CBI for not incorporating the second suggestion of the CBI. It was urged that the respondent being a State could not act arbitrarily and discard the suggestions given by the CBI without recording reasons even though it may or may not be disclosed to the petitioner.

4. The learned counsel for the petitioner further submitted that he is supported in this regard by the judgment of Hon'ble Supreme Court in the case of M/s Hochtief Gammon v. State of Orissa & ors. (1975) 2 SCC 649, in particular, paragraph 13 thereof which reads as follows:

“13. The Executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should they take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. It is no answer to the exercise of that power to say that the Executive acted bona fide nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reasons. If they give reasons and they are not good reasons, the court can direct them to reconsider the matter

in the light of relevant matters, though the propriety, adequacy or satisfactory character of those reasons may not be open to judicial scrutiny. Even if the Executive considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts.”

5. In our view, undoubtedly, such an administrative order obviously cannot avoid scrutiny of the Court to enquire whether reasons exist. In the present case, the ratio of the above decision would not be applicable as the above decision of the Hon'ble Supreme Court arose from the fact as to the refusal of the Government to record reasons for not making a reference under Section 10 (1)(d) of the Industrial Disputes Act, 1947. In our view, in the present case, it cannot be said that the MCD had not applied its mind to the suggestions made by the CBI. The very fact that out of two suggestions given by the CBI, one has been accepted by the MCD, demonstrates that the MCD was alive to the recommendations made by the CBI. The second recommendation which has been accepted was to the effect that cloth to be supplied by the bidder should be approved by the Government and the NABL accredited laboratories. As a matter

of fact the tender conditions lay down that before the tender is awarded such an inspection can be got done at the expense of the bidder himself. Further, during the subsistence of the contract also the tenderer could get the said testing done again. Therefore, the important recommendation has already been accepted and incorporated in the tender. Looked from another angle, these are only recommendations and therefore they may or may not be accepted. The learned counsel for the petitioner is also contending that they also want to know as to whether the second recommendation was considered or not. The very fact one of the conditions was accepted goes to show that both of them must have been considered by the Respondent. Further, by accepting the second recommendation it would eliminate the small scale manufacturers who though may not have composite textile mill may be still maintaining good quality control so far as the cloth is concerned. There is no law which requires the MCD to accept all suggestions made by the MCD we have already noticed that the MCD had given consideration to the CBI's suggestions though not in toto.

6. Therefore, we see good reason for the respondent/MCD not to accept the

second condition as it would eliminate one particular class of manufacturers altogether from bidding which may not be good for the respondent as it would generate a monopoly ousting small scale industry which would run counter to public interest. Therefore, we do not find force in the argument of the learned counsel for the petitioner. It has been held by the Hon'ble Supreme Court in the case of Directorate of Education and ors. v. Educomp Datamatics Ltd. and ors., (2004) 4 SCC 19, as follows:

“9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India. After examining the entire case law the following principles have been deduced.

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal

but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. [Emphasis supplied]

10. In *Air India Limited v. Cochin International*.

Airport Limited this Court observed: (SCC p.623, para 7)

"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. *The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. (Emphasis supplied).* It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

11. This principle was again re-stated by this Court in *Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors.*, (2000) 5

SCC 287. It was held that the terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.”

7. We are satisfied that the above position of law fully applies to the facts of the present case, accordingly, we find no merit in the writ petition and the same is dismissed. No order as to costs.

MUKUL MUDGAL, J

V. K. SHALI, J

MAY 19, 2008

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