

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

+ **WP (C) No. 6264/2008**

Date of Decision : September 11th, 2008

NARESH KHETRAPAL

Through : Petitioner
Dr. A.M. Singhvi, Senior
Advocate with Mr. N.K. Kaul,
Senior Advocate with Ms. Priya
Kumar and Mr. Amit Khanna,
Advocates.

Versus

UOI

Through : Respondent
Mr. Pradeep K. Bakshi,
Advocate

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

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.

J U D G M E N T

MUKUL MUDGAL, J. (ORAL)

CM No. 12766/2008

1. For the reasons recorded in the application for amendment and in view of fact that the Petitioner was never told that a vigilance enquiry was pending against him, the application for amendment is allowed and the Petitioner is permitted to challenge the validity of Clause 8(h) of the Tender terms.

2. The application stands disposed of.

WP (C) No. 6264/2008 & CM No. 11962/2008

1. Rule D.B.

2. With the consent of learned Counsel for the parties the Writ Petition is taken up for final hearing.

3. The present writ petition apart from challenging the decision of the Respondent not to open the financial bid of the Petitioner also seeks to challenge the legality of Clause 8(h) in respect of the Tender bearing No. 5.TP (10)/2008 dated 30.6.2008 which authorizes the Ministry of Tourism not to accept bids from agencies resorting to unethical practices or on whom investigation/enquiry proceeding has been initiated by the government investigating agencies/vigilance cell. In fact on the basis of Clause 8 (h) the Petitioner's tender has not been considered.

4. The brief facts of the case as stated by the Petitioner are as follows:-

- (i) The petitioner is the sole proprietor of Span Communications which is involved in the business of advertisement and promotion in different Medias in India and abroad. The Respondent is the publicity department of the Ministry of Tourism.
- (ii) The petitioner has been promoting, making and releasing advertisements in different Medias for various Government bodies like the ITDC and the respondent.
- (iii) On 15.1.2008 the respondent invited bids from the public in

respect of the domestic media campaign 2007-08. The respondent invited bids in respect of four such campaigns bearing Nos. 5.TP (51)/2007, 5.TP (52)/2007, 5.TP (53)/2007 and 5.TP (54)/2007.

- (iv) On 23.1.2008 the petitioner was invited to participate in a tender for production of creative for domestic media campaign 2007-08 bearing No. 1.TP(2)07.
- (v) By its letter dated 29.1.2008 the petitioner submitted its bid for tender No. 1.TP (2)/07.
- (vi) On 4.2.2008 the petitioner submitted the bid documents in respect of tender Nos. 5.TP (51)/2007, 5.TP(52)/2007, 5.TP (53)/2007 and 5.TP(54)/2007.
- (vii) In February 2008 the bid of the various tenderers was to be opened and the tendering process was to proceed further. However the petitioner did not receive any information regarding the bid submitted by it. The petitioner was therefore constrained to write to the respondent a letter dated 5.03.2008 requesting it to be informed of the reason for being kept out of the tendering process and the bid of the petitioner not even being opened for consideration.
- (viii) The petitioner did not get any response to the letter and therefore reminder was issued on 12.4.2008.
- (ix) Despite regular follow ups, the petitioner got no response to its letters dated 25.3.2008 and 12.4.08. The petitioner thereafter tried to meet the concerned officer of the respondent, however, the petitioner failed to get a meeting with the concerned officer.

- (x) The petitioner requested a meeting with the Secretary Ministry of Tourism seeking redressal of his grievance and also to ascertain the problem but he received no response.
- (xi) Simultaneously the petitioner made an application under Right to Information Act, 2005 for information regarding the reason for non acceptance/ non opening of the bids submitted by the petitioner.
- (xii) In response to the RTI application the petitioner received a reply dated 29.5.2008 stating that the petitioner should refer to Clause 8 (i) in respect of tenders bearing Nos. 5.TP (51)/2007, 5.TP (52)/2007, 5.TP (53)/2007 and 5.TP (54)/2007 and Clause 8 (k) in respect of tender bearing No. 1.TP (2)/2007. Clause 8 (k) and (i), which are identical clauses, are as follows:-

“8(i) & 8 (k) The Ministry of Tourism reserves its right not to accept bids from agencies resorting to unethical practices or on whom investigation/ enquiry proceedings has been initiated by Government investigating agencies /Vigilance Cell.”

- (xiii) On 10.7.2008 bids were invited for a tender bearing No. 5.TP (10)/2008 dated 30.6.2008 in respect of advertising in the Electronic and Print media in the regions of Americas, Europe, APAC and ‘Global’ during 2008-09.
- (xiv) On 4.8.2008, in response to the invitation and the public notice the petitioner submitted his bid and deposited an amount of Rs. 30 lacs each towards the two bids.

(xv) The bids were to be submitted by 4.8.2008 as per the advertisement. The petitioner made enquiries on a daily basis about the schedule of opening the bids but he got no response. On 22.8.2008 the petitioner was told that the financial bids of some of the bidders were opened and their technical bids had been opened earlier. The petitioner again made enquiries about his bid but however he could not get any information. Subsequently, the petitioner has come to know that the other bids have been opened except that of the petitioner had been opened and on that occasion too it had been decided that the petitioner's bid will not be opened.

5. The main contention of the learned Senior Counsel for the Petitioner, Dr. A.M. Singhvi and Shri N.K. Kaul, is that the said clause 8(h) is vague, ambiguous and also in violation of Articles 14, 19 (1) (g) and 21 of the Constitution of India. The said clause permits the respondent to take the extreme step of debarring any bidder on the assumption of it resorting to unethical practices on the mere pendency of an investigation/enquiry against any agency. Thus the respondent has interpreted the clause to take punitive action without any notice to the bidder against whom the punitive action is proposed. This is a clear violation of principles of natural justice and the rights enshrined in Articles 14, 19(1) (g) and 21 of the Constitution. He further pleaded the Court to read down the tender condition to include compliance with the principles of fairness and natural

justice as a condition precedent for any action under Clause 8(h).

6. He relied upon the principles of law as enshrined in the ***Southern Painters Vs. Fertilizers & Chemicals Travancore Ltd. & Anr. reported in 1994 Supp (2) SCC 699*** and in particular relied upon paras 9 and 11 which read as follows :-

“9. In Erusian Equipment & Chemicals Ltd. v. State of W.B. this Court observed: (SCC p. 75, paras 17, 18 & 20)

“The State need not enter into any contract with anyone but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person’s character and personality. Blacklisting tarnishes one’s reputation.

Exclusion of a member of the public from dealing with a State in sales transactions has the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people.

Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.....

.....11. The deletion of the appellant’s name from the list of approved contractors on the ground that there were some vigilance report against it, could only be done consistent with and after due compliance with the principles of natural justice. That not having been done, it requires to be held that withholding of the tender form from the appellant was not justified. In our opinion, the High Court was not justified in dismissing the writ petition.”

7. The learned Senior Counsel for Petitioner relying on the above judgment laid stress on the fact that in the aforementioned judgment even a vigilance report existed against the affected party and inspite of existence of the vigilance report, the Appellant's name in that case was not permitted to be deleted from the list of approved contractors. He thus submitted that on this account, virtually black listing the Petitioner without any opportunity to show cause, is contrary to the law as laid down by the Apex Court in ***Erusian Equipment & Chemicals Ltd. Vs. State of W.B. reported in (1975) 1 SCC 70*** and further upheld by the Apex Court in the case of ***Southern Painters (supra)***.

8. In order to further strengthen his argument, the learned Senior Counsel for Petitioner also placed reliance upon the judgment of the learned Single Judge of this Court in ***Kavery Infrastructure Pvt. Ltd. Vs. The Delhi Jal Board and Anr. in WP (C) No. 5398/2007 para Nos. 17 & 18***.

9. The learned Counsel for the Respondent, Mr. Pradeep K. Bakshi, responded by contending that the conduct of the Petitioner was tainted. For this purpose he showed that a vigilance enquiry was initiated in the month of December, 2007 against a former Private Secretary to the Minister of State for Tourism. The said enquiry is said to be pending. Mr. Bakshi submitted that since the name of the Petitioner was indicated in the said enquiry, he was barred by the provision as mentioned in Clause 8(h) and accordingly his bid could not be considered. The said Clause 8(h) is reproduced herein below:-

“Clause 8(h). The Ministry of Tourism reserves its right not to accept bids from agencies resorting to unethical practices or on whom investigation/enquiry proceedings has been initiated by Government Investigating Agencies/Vigilance Cell.”

10. The learned Counsel for the Respondent relied upon the judgment of the Hon'ble Supreme Court in ***Delhi Development Authority & Anr. Vs. UEE Electricals Engg. (P) Ltd. & Anr. reported in (2004) 11 SCC 213.***

The relevant paras of the said judgment read as under:-

“12. Courts are slow to interfere in matters relating to administrative functions unless decision is tainted by any vulnerability such as lack of fairness in procedure, illegality and irrationality. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

14. The law is settled that in considering challenge to administrative decisions courts will not interfere as if they are sitting in appeal over the decisions.”

11. To further strengthen his argument he referred to and relied upon the judgment of the Hon'ble Supreme Court in ***Ugar Sugar Works Vs. Delhi Administration & Ors. reported in (2001) 3 SCC 635 para 18*** which reads as follows :-

“18. The challenge, thus, in effect, is to the executive policy regulating trade in liquor in Delhi. It is well settled that the courts, in exercise of their power of judicial review, do not ordinarily interfere with the policy decisions of the executive

unless the policy can be faulted on grounds of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed, arbitrariness, irrationality, perversity and mala fide will render the policy unconstitutional. However, if the policy cannot be faulted on any of these grounds, the mere fact that it would hurt business interests of a party, does not justify invalidating the policy. In tax and economic regulation cases, there are good reasons for judicial restraint, if not judicial deference, to judgment of the executive. The courts are not expected to express their opinion as to whether at a particular point of time or in a particular situation any such policy should have been adopted or not. It is best left to the discretion of the State.”

12. The learned Counsel for Respondent also relied upon the judgment of ***Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors. reported in (2004) 4 SCC 19 paras 11 & 12*** which reads as follows :-

“11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn. 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 ones prescribed in the earlier tender invitations.

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. There is no doubt that the Court is not required to sit in appeal over an administrative or a policy decision but, in our view, here the challenge is not to any administrative decision. The challenge in the present petition does not fall within the parameters of administrative decision/policy but the challenge is to a specific term in the tender contract which amounts to black listing. It is also an admitted case that the petitioner has not been put to notice of either the alleged enquiry or of the proposed action of debarring the petitioner from participating in the tender. The respondent has in fact debarred the petitioner on the basis of a pending enquiry which is stated to be confidential. In our view, the above judgments referred to by the learned counsel for the respondent are also not applicable to the present case as the terms of the contract which is manifested in Clause 8(h) is challenged on the basis of arbitrariness, irrationality, perversity and lack of fairness in procedure, which is permitted on the basis of the judgments relied upon by the Petitioner. The above judgments on the contrary would apply in favour of the Petitioner as the terms of the contract in Clause 8 (h) of the tender cannot be stretched by any imagination to exclude from its ambit the principles of fairplay and natural justice.

14. The learned Counsel for the Respondent also referred to and relied upon the judgment of the Apex Court in **Krishnan Kakkanth Vs. Government of Kerala & Anr reported in (1997) 9 SCC 495, para 32.**

The relevant para reads as follows:-

“32. It may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or an individual has got a right to enter into contract with a particular person or to determine a person or persons with whom he or it will deal”.

15. In our view, the above judgment does not have any application in the facts of the present case. The Petitioner cannot insist on trade with the Government or any other individual for doing business with him but at the same time the Government also cannot arbitrarily refuse to do business with the petitioner. Any such action by the respondent would be hit by Article 14, 19(1)(g) of the Constitution, being arbitrary and unfair and affecting the right of the Petitioner to carry on business. The right to equality, fairplay and trade conferred under the Constitution to the Petitioner can only be restricted on the basis of reasonable restrictions.

16. The question of interpretation of statutes was also raised and dealt with by the Hon'ble Supreme Court in the case of **Sunil Batra vs. Delhi Administration & Ors. reported in AIR 1978 SC 1675.** The relevant para 38 of the said judgment is reproduced herein below:-

“38. Constitutional deference to the Legislature and the democratic assumption that people’s representatives express the wisdom of the community lead courts into interpretation of statutes which preserves and sustains the validity of the provision. That is to say, courts must, with intelligent imagination, inform themselves of the values of the Constitution and, with functional flexibility, explore the meaning of meanings to adopt that construction which humanely constitutionalizes the statute in question. Plainly stated, we must endeavour to interpret the words in Sections 30 and 56 of the Prisons Act and the paragraphs of the Prison Manual in such manner that while the words belong to the old order, the sense radiates the new order. The luminous guideline in Weems v. United States sets our sights high:

“Legislation, both statutory and constitutional is enacted, it is true, from an experience of evils, but — its general language should not, therefore, be necessarily confined to the form that evil had therefore taken. Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it”. The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and

power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in the words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.”

(emphasis supplied)

17. In our view, rather than strike down Clause 8(h) as violative of Article 14 and Article 19(1)(g) of the Constitution, it would be sufficient if we construe it by reading it down to sustain its constitutionality. Consequently, we uphold the validity of Clause 8(h), by construing it to mean that the Clause 8(h) can be invoked only if the investigating agencies have arrived at least at a conclusion of the involvement of the affected parties on a prima facie basis and that to after the existence of the enquiry was brought to the notice of the Petitioner and an opportunity of hearing was given to the petitioner.

18. In view of the above interpretation of Clause 8(h), we also hold that since the Petitioner was not given an opportunity to show cause, the said Clause 8(h) was not properly invoked. It is also to be seen from the aforementioned judgments of ***Southern Painters (supra)*** and ***Erusian Equipment (supra)*** that the situation would have been different if the decision not to open the petitioner's tender had been taken after giving an opportunity of hearing to the petitioner.

19. The learned Senior Counsel for Petitioner demonstrated that the

reply to the RTI only revealed that Clause 8(i)/(k) identical to Clause 8(h) was invoked against him and did not disclose the existence/knowledge of the pending vigilance enquiry against the Petitioner. Mr. Bakshi submitted that the reliance of Clause 8(h) in the said reply should have led the Petitioner to conclude that his name was involved in the vigilance enquiry. In the present case, the response to the RTI enquiry did not reveal that in fact a vigilance enquiry was pending against the Petitioner but only revealed about the invocation of Clause 8(i)/(k). The Petitioner has averred that reply to his RTI application revealed only about the invocation of Clause 8(i)/(k) identical to Clause 8(h) and that Petitioner was not aware of the vigilance proceedings against him. In fact the said averments have not been rebutted. Consequently, we are of the view that this plea is not available to the Respondent.

20. Mr. Bakshi further stated that the Petitioner having participated in the tender could not challenge the validity of Clause 8(h). In our view, any clause in the tender defining the terms of the contract cannot be arbitrary and violate the principles of fairplay and natural justice. The said Clause cannot permit the respondent to debar or black list any bidder on the mere pendency of any investigation/enquiry. When any complaint is pending against any agency a proper enquiry should be initiated to check the veracity of the complaint after giving notice to the affected party and adequate opportunity of hearing should be given to the affected party. Any other interpretation of the said Clause 8 (h) would violate the fundamental rights granted by the Constitution and would lead to arbitrariness, irrationality and would be against the principles of fairness and natural

justice.

21. Accordingly, the Petitioner is entitled to succeed in view of our finding that Clause 8(h) can not be invoked against the Petitioner in the present case without giving him an opportunity of being heard. We consequently issue a Writ of Mandamus directing the Respondent to consider the bid of the Petitioner uninfluenced by the impact of Clause 8(h). However, we make it clear that this judgment will not come in the way of the Respondent invoking Clause 8(h) against the Petitioner in case a show cause notice is issued to the Petitioner and action thereafter taken in consonance with law.

**[MUKUL MUDGAL]
JUDGE**

**[MANMOHAN]
JUDGE**

SEPTEMBER 11, 2008
rn/rb