

* **HIGH COURT OF DELHI : NEW DELHI**

+ **Writ Petition (Civil) No.17348 of 2006**

Judgment reserved on: January 13, 2009

% Judgment delivered on: January 21, 2009

M/s Suncity Projects Pvt. Ltd.
(A company incorporated under
the Companies Act, 1956)
Having its Registered Officer at:
N-49, First Floor, Connaught Place
New Delhi-110001.

Through its Director Sh. Laxmi Narain Goel. ...Petitioner

Through Mr.Arun Jaitley, Sr. Advocate with
Mr.Dinesh Kumar Gupta, Adv.

Versus

1. Government of N.C.T. of Delhi
Through: General Manager
Transport Department
I.S.B.T., Kashmiri Gate
Delhi-110006.

2. RITES Ltd.
Through its General Manager
New Delhi House, 27
Barakhamba Road
New Delhi-110001.

...Respondents

Through Mr.Rakesh Tiku with Ms.Aruna
Tiku, Advs. for Resp. 1
Ms.Sadhana Sharma, Adv. for Resp.2

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

MADAN B. LOKUR, J.

The question that arises for consideration is whether the cancellation of the tender process initiated by Respondent No.1 was mala fide and at the behest of Respondent No.2 (RITES Ltd.). In our opinion, the circumstances justified the cancellation of the tender process and no mala fides can be attributed to the cancellation.

2. Respondent No.1 decided to construct, operate and maintain an Interstate Bus Terminal (ISBT) at Dwarka. It was decided that the construction, operation and maintenance would be on a Build, Operate and Transfer (BOT) basis. Respondent No.1 engaged RITES Ltd. as a Project Development Consultant.

3. On or about 10th November, 2004 Respondent No.1 issued a request for qualification as the first part of a bidding process. The second part consisted of an invitation of request for proposal from pre-

qualified parties for submission of their technical and financial bids.

4. There is no dispute about the fact that the Petitioner was technically qualified and was the highest bidder. The estimated cost of the project was given by the Petitioner as Rs.25.87 crores and this included Rs.6.6 crores as its profit component.

5. After the Petitioner gave confirmation of its bid (which was some time in August, 2005), it was required by Respondent No.1 to extend the validity of the bid security submitted in the form of a bank guarantee and also the fixed deposit. It appears that the Petitioner was required to continue the extension from time to time until it received a letter dated 21st September, 2006 from RITES Ltd. simply stating that the Transport Department of the Government of National Capital Territory of Delhi had cancelled the tender for the development of ISBT, Dwarka on BOT basis.

6. The Petitioner was obviously shocked and anguished at the sudden turn of the events and, therefore, filed the present writ petition under Article 226 of the Constitution for an appropriate direction for

quashing the communication dated 21st September, 2006 and a direction to Respondent No.1 to award the work to the Petitioner in terms of the bid already submitted.

7. During the pendency of the writ petition, Respondent No.1 invited fresh tenders on 5th May, 2008. By an interim order passed by this Court, it was made clear that the Petitioner would be entitled to participate in the bidding process without prejudice to its rights and contentions raised in the writ petition. It was also directed that the bids now received shall not be finalized.

8. It appears that the Petitioner had some apprehension that RITES Ltd. would also be participating in the second tender but it was made clear by learned counsel appearing for RITES Ltd. on 22nd May, 2008 that his client would not be participating in the tender dated 5th May, 2008.

9. Respondent No.1 has filed a counter affidavit justifying the decision taken by it. It is stated that there was a change of circumstances in as much as the new Master Plan for Delhi and

Development Control Norms for ISBTs have been changed by the Delhi Development Authority. Earlier, the ground coverage was 3% and it has now been raised to 25%. Earlier, the floor area ratio (FAR) was 7 and it has now been raised to 100. A provision has also been made for hotel/passenger accommodation at ISBTs. According to Respondent No.1, there is significant potential for better commercial utilization of the ISBT plots which will be a source of maximum revenue generation. Accordingly, it was decided in the public interest that the bid of the Petitioner be cancelled and fresh tenders invited to generate maximum revenue from the project.

10. Learned counsel for the Petitioner submitted that the Tender Committee dealing with the original tender had come to the conclusion that the revenue estimates in terms of the offer made by the Petitioner appeared to be high and that the offer given by the Petitioner ought to be accepted. It was also submitted that the original tender was cancelled at the behest of RITES Ltd., as is evident from a letter dated 30th August, 2006 issued by RITES Ltd. to the Transport Department of the Government of National Capital Territory of Delhi. The letter dated 30th August, 2008 reads as follows: -

“No. RITES/UT/445/2006

Dated: 30.08.2006

The Transport Commissioner
GNCTD
5/9, Under Hill Road,
Delhi-110054.

(Kind Attention: Dr. V.S. Madan, IAS)

Subject: Development of ISBT at Dwarka on BOT basis.

Ref.: GNCTD/Transport Department letter No. F2(8)AE(p)04-05/TCD/ISBT/Pt.516/525 dated 11.8.2006

Dear Sir,

- 1.0 During the meeting held between RITES and representatives of Transport Department on 18.8.2006 it was brought out by you that recently DDA has in principle, agreed to new development control norms for ISBTs. The new norms allow for greater utilization of space for permitted commercial activities at ISBTs. Therefore, there was need to have a fresh look on the offer under consideration for award of Concession Agreement to the preferred bidder. Recommendations of RITES for further on date by you with MD/RITES and the undersigned and RITES recommendations for further action on the offer have been sought.
- 2.0 With the new development control norms there is significant potential for better commercial utilization of the plot. Accordingly it is proposed that fresh bids be invited for development of the ISBT. However we feel that this should be done only after the norms have been notified by the DDA.

3.0 Thanking you and assuring you of our best attention always.

Yours faithfully,

Sd/-

(A.K. Arora)

Group General Manager (UT)

Copy to: Shri Krishna Kumar, GM, ISBT, Kashmere Gate,
Delhi.”

11. According to learned counsel for the Petitioner, the actual reason why RITES Ltd. recommended cancellation was that it was intending to make a bid in the re-tendering process. It was submitted that this is clear from the fact that Respondent No.1 had once again given an offer to RITES Ltd. for the project development consultancy but this offer was turned down since RITES Ltd. had admitted that it was contemplating to bid for the transport infrastructure project. For this, learned counsel for the Petitioner has drawn our attention to a letter dated 9th May, 2007 issued by RITES Ltd. to the Transport Department. The letter dated 9th May, 2007 reads as follows: -

“No. RITES/UT/445/2005

Dt.: 09.05.2007

The General Manager

Govt. of National Capital Territory of Delhi

Transport Department
ISBT Kashmere Gate
Delhi.

(Kind Attn. Shri Krishan Kumar)

Subject: Development of Dwarka & Narela ISBT on BOT basis.

Ref.: Your letter No. F2(8)AE(P)04-05/TCD/ISBT/TPT/92 dated 03.05.2007

Dear Sir,

We thank you for your above referred letter asking us to submit a fresh Proposal for Project Development Consultancy for the subject work.

In this connection it is mentioned that we in RITES are contemplating to bid for transport infrastructure projects to be implemented through BOT/PPP route. Our association with the subject project as PDC will prohibit us from bidding for this project as BOT operator at a later date. You are, therefore, requested to make alternative arrangements for availing consultancy services.

Thanking you and assuring you of our best attention always.

Yours faithfully,

Sd/-
(A.K. Arora)
Executive Director (UI)”

12. On these broad facts, the submissions made by learned counsel for the Petitioner were three-fold. It was firstly submitted that

the Petitioner was admittedly the highest bidder as far back as in August, 2005 and its bid was kept pending for more than a year for some inexplicable reason. Though changes in the Master Plan were, in fact, made in 2007 but surely that could not have been the real reason for not awarding the contract to the Petitioner for such a long period of time. In this context, it was submitted that even if Respondent No.1 was aware of the proposal to amend the Master Plan, the increase in the ground coverage and FAR could have been taken care of by making pro-rata adjustments and asking the Petitioner to suitably increase the bid amount.

Secondly, the entire exercise of re-tendering was mala fide in as much as RITES Ltd. was itself interested in the contract and this is clear from the fact that it refused the project consultancy at the stage of re-tendering on the ground that it was contemplating making a bid for the contract. Since the actions of RITES Ltd. were mala fide, they naturally coloured the understanding of Respondent No.1 leading to an avoidable cancellation of the tender.

Finally, it was submitted that there was no valid reason in

law for Respondent No.1 to have cancelled the tender. While it is true that Respondent No.1 is entitled to generate the maximum revenue, it must take other factors into consideration, such as the possibility of awarding the contract to the highest bidder through negotiations.

13. We are not impressed with any of the submissions made by learned counsel for the Petitioner. It is true (and unfortunate) that Respondent No.1 kept the tender of the Petitioner pending for about a year or so. It appears to us that Respondent No.1 was aware that changes in the Master Plan were in the offing and that that would have a major impact on the generation of revenue from the contract. This is clear from the fact that in the letter dated 30th August, 2006 issued by RITES Ltd. to the Transport Department of the Government of National Capital Territory of Delhi it was specifically mentioned that in a meeting held on 18th August, 2006 it was brought out that the Delhi Development Authority had, in principle, agreed to new Development Control Norms for ISBTs. These new norms allowed for greater utilization of space for commercial activities. It is clear, therefore, that sometime in August, 2006, if not earlier, Respondent No.1 was aware that there would be a change in the Development Control Norms which

would have a major financial impact. There is nothing on record to suggest when actually Respondent No.1 came to know that the Master Plan was likely to be changed or amended but assuming that it came to know about this only in August, 2006 it took more or less immediate steps by making the Petitioner know in September, 2006 that the tender was cancelled. It is not clear what transpired between August, 2005 and August, 2006 but learned counsel for the Petitioner has not made any grievance in this regard. The time lag is unfortunate but it does seem that Respondent No.1 acted soon after it came to know of the changes.

14. That substantial changes were made to the Master Plan in 2007 is not in dispute. According to learned counsel for the Petitioner, these changes could have been taken into consideration and the Petitioner asked to make pro-rata adjustments in its bid. Of course, this was a possibility that was available to Respondent No.1. But another option available was to go in for a fresh tender which might have attracted wider and greater participation due to the sweeping changes brought about in the Master Plan which increased the ground coverage from 3% to 25% and FAR from 7 to 100. Which was the better option to adopt is not really for the courts to decide and Respondent No.1 must

be given adequate leeway in taking a decision in this regard. The Supreme Court has time and again observed that if the Court prefers one option to another, it does not mean that the less preferred option taken by the administrative authority is incorrect. Some latitude must be given to the administrative authority in the decision making process and the courts should restrain themselves from exercising the power of judicial review unless necessary. (See for example *Tata Cellular v. Union of India*, (1994) 6 SCC 651)

15. It is true that the decision taken by Respondent No.1 should not be arbitrary or should not be colourable. But what we find in the present case is that the decision not to go in pro-rata adjustments was not an irrational decision but it was a decision taken after considering the revenue implications as a result of the changes in the Master Plan. The tender was essentially a commercial venture on the part of Respondent No.1 and it took a commercial decision which cannot be said to be either unreasonable or irrational so as to warrant interference under Article 226 of the Constitution. We, therefore, reject the first submission made by learned counsel for the Petitioner.

16. In so far as the involvement of RITES Ltd. as a consultant to Respondent No.1 is concerned, it is true that it was involved in a project development consultancy at an earlier stage. It does appear that RITES Ltd. did intend to bid when fresh tenders were sought to be called but better sense prevailed and it was decided that it would not participate in the fresh tender. This is what one could have expected from RITES Ltd. which had access to “insider” information in so far as the ISBT project was concerned. But this does not lead to the conclusion that the original tender was cancelled at the behest of RITES Ltd.. As we have noticed above, relevant and germane factors were taken into consideration by Respondent No.1 for cancelling the tender and it is on that basis that it had acted. Even otherwise, RITES Ltd. was only a consultant to the project and its opinion was not binding upon Respondent No.1, which could have always rejected the recommendation to cancel the tender, if circumstances so warranted. It cannot be said with any degree of certainty on the material before us that the cancellation of the original tender was entirely at the behest of RITES Ltd. or was motivated by the desire of RITES Ltd. to participate in the re-tender. We do not find any substance in the second contention urged by learned counsel for the Petitioner.

17. There is no doubt that in law Respondent No.1 has the power to cancel the tender and indeed this was not even questioned by learned counsel for the Petitioner. However, that power cannot be exercised arbitrarily or contrary to the provisions of Article 14 of the Constitution. If the discretionary power is so exercised, the courts can always step in by way of judicial review and remedy the situation. This has been so held by the Supreme Court in *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another*, (2005) 6 SCC 138.

18. In so far as the present case is concerned, we have come to the conclusion that there were good reasons for Respondent No.1 to cancel the tender and one of the major (and relevant) factors that influenced Respondent No.1 was the fact that a significant change had been made in the Master Plan specifically with regard to ISBTs. That change would have had a considerable impact on the amount of revenue that could have been generated by Respondent No.1 as well as greater participation in the project from some other builders and contractors. Apart from the change in ground coverage and FAR, the Master Plan now permitted the construction of hotels and passenger accommodation which was not permissible in the earlier Master Plan. In fact, we have

been informed that earlier hotel and passenger accommodation were not even permissible at the ISBTs. We have also been informed by learned counsel for Respondent No.1 that there has been an encouraging response to the re-tendering process and participation has gone up manifold. In our opinion, Respondent No.1 could have, in law, cancelled the tender on the basis of the material before it, which it did, and no fault can be found with the decision taken.

19. We find no merit in the writ petition. It is accordingly dismissed with costs of Rs.20,000/-. The Petitioner will deposit this amount in the Registry of this Court by way of a demand draft drawn in favour of the Registrar General within four weeks from today.

20. List for compliance on 26th February, 2009.

MADAN B. LOKUR, J

January 21, 2009
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SIDDHARTH MRIDUL, J

Certified that the corrected copy of the judgment
has been transmitted in the main Server.