

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

% **Judgment reserved on: 23.01.2009**
Judgment delivered on: 30.03.2009

+ **R.A. NO.297/2008 IN W.P.(C) 4684/2008**

NARENDER H.CHANDWANI Petitioner
Through: Mr. Rahul Gupta & Mr. Rajnish
Mishra, Advocates

versus

M.C.D. & ANR. Respondent
Through: Mr. Amit K. Paul, Advocate

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

VIPIN SANGHI, J.

1. This writ petition had been heard and finally disposed of on 4.7.2008. The petition had been filed to seek a writ of certiorari to quash the decision of the MCD contained in its circular dated 19.5.2008 which reads as under:-

“The Commissioner, MCD vide orders dated 06.05.2008 has removed M/s Sona Consultant & Contractors, Prop. Sh. Narender H Chandwani, R/o H.No.O-55, Lajpat Nagar-II, New Delhi-24 from the approved panel of the contractors of MCD on account of none execution of work awarded against work orders No.453/EE (Br.)-I/TC/CS/06-07 dated 25.01.2007.

This is notified & circulated to all concerned
for information and necessary action.”

2. On 25.1.2007, the petitioner had been awarded two works under the Unit Rate Method (URM) Scheme, whereunder the MCD awards petty works to its registered contractors. The estimated value of such works, at the relevant time did not exceed Rs. two lakhs. The petitioner did not carry out the said works. The respondent accordingly issued a notice dated 19.2.2007. The petitioner was called upon to take steps to execute the works. Since the petitioner failed to take any steps, another notice was issued to the petitioner on 11.9.2007. Thereafter some correspondence took place between the parties, which led to the issuance of the impugned communication dated 19.2.2008 by the respondent.

3. Vide judgment dated 4.7.2008, this Court rejected the explanation furnished by the petitioner to justify its failure to execute the works. The submission of the petitioner that the impugned order/circular had been issued without complying with the principles of natural justice was also rejected. The submission of the petitioner that the impugned circular was excessively harsh and disproportionate was also rejected on the premise that on account of the issuance of the impugned order/circular removing the petitioner from the approved panel of contractors of MCD, the petitioner would not be debarred from applying for fresh enlistment in terms of the instructions issued by the MCD. It was observed that the eligibility criteria as set out in the enlistment rules does not render a person like the petitioner, who has

been once removed from the approved panel of contractors of MCD, ineligible from again seeking enlistment. This finding was founded on a reading of "Instructions for enlistment of Contractors in M.C.D" circulated vide circulated dated 7.8.2001/13.8.2001 (referred to as "Enlistment Rules of 2001") which were relied upon by the parties. It was, therefore, directed that in case the petitioner makes an application for his enlistment afresh, his application would be considered in accordance with the enlistment rules/instructions. The Court came to the finding that for the aforesaid reasons, the impugned order could not be labeled as being vague or harsh.

4. The petitioner has filed the aforesaid review petition stating that by the impugned order/circular issued by the respondent MCD dated 19.5.2008, the petitioner and his proprietary firm has been removed from the approved panel of contractors of MCD on permanent basis. The petitioner has placed on record the latest and revised "*Instructions for enlistment/revalidation of Contractors in MCD*" issued vide circular dated 11.3.2008 (hereinafter referred to as the "Enlistment Rules of 2008"). These instructions though in force at the relevant time, were not brought to the notice of the Court earlier when the matter was heard and decided. Clause 4.1 of the said instructions provides that no individual, who is removed from the approved list of contractors shall be entitled for enlistment. The same reads as follows:-

"4.1 No individual, or a firm having such individual as one of the partners, who is a dismissed government servant; or removed from the approved list of contractors; or demoted to lower class; or having business banned/suspended by any government department in the past; or

convicted by a Court of law shall be entitled for enlistment.”

5. The petitioner therefore submits that by virtue of the aforesaid instructions, he is not eligible to reapply for enlistment as a Contractor in MCD and the impugned circular dated 19.05.2008 has the effect of permanently debarring the petitioner from enlisting himself with the MCD and, consequently, from taking any work from the MCD.

6. Notice was issued on the aforesaid review application on 14.2.2008. While issuing notice this Court, *inter alia*, observed:

“The submission of the petitioner is that the Court had proceeded to dismiss the writ petition of the petitioner on the foundation that the removal of the petitioner from enlistment would not debar him from seeking fresh enlistment with the MCD. This understanding was founded upon the enlistment rules as produced before the Court by the petitioner. However, alongwith the application for review, the petitioner has now produced the enlistment rules circulated on 11.03.2008, which were, in fact, applicable to the petitioner’s case as per Clause 4.1, which provides that no individual or firm having such individual as one of the partners is removed from the approved list of contractors shall be entitled to enlistment. The foundation upon which the judgment was made by the Court is, therefore, taken away. Counsel for the respondent should, therefore, specifically take instructions on the aforesaid aspect and deal with it in its reply.”

7. Reply has been filed by the respondent and thereafter arguments have been heard. Learned counsel for the respondent fairly conceded that when the impugned judgment was delivered by the Court on 4.7.2008, an erroneous impression had been conveyed to the Court with regard to the effect of the impugned order/circular

dated 19.5.2008, as the Enlistment Rules of 2008 were not brought on record. It was also conceded that the effect of the impugned order/circular would indeed be to permanently debar the petitioner from seeking enlistment with the respondent MCD for doing any kind of work.

8. Mr. Gupta has relied on ***Board of Control for Cricket in India V. Netaji Cricket Club and Others***, (2005) 4 SCC 741 to submit that an application for review would be maintainable not only upon discovery of a new and important piece of evidence, or when there exists an error apparent on the face of the record, but also if the same is necessitated on account of some mistake, or for any other sufficient reason. The expression “sufficient reason” used in Order 47 Rule 1 C.P.C is wide enough to include a misconception of fact or law by a Court or even by an Advocate. He submits that the present case squarely falls within the parameters stated by the Supreme Court in the aforesaid decision.

9. I find merit in this submission of Mr. Gupta. As noticed hereinabove while passing the impugned judgment dated 4.7.2008, the Court indeed proceeded on the foundation that the impugned order/circular does not have the effect of permanently debarring the petitioner from seeking enlistment and that it was open to him to seek fresh enlistment. This understanding was founded upon the Enlistment Rules of 2001. In view of the aforesaid admitted position, that understanding was incorrect. Consequently, the judgment dated 4.7.2008 is liable to be reviewed.

10. Consequently, the learned counsels were permitted to make their submissions on merits. However, It was made clear to the petitioner that the arguments which had either been raised earlier and considered by the Court, or were open to be raised by the petitioner but had not been so raised could not be permitted to be raised in review, and the only submission that the petitioner may now advance should be those which could not earlier be advanced and considered on account of the Enlistment Rules of 2008 not being on record.

11. Mr. Rahul Gupta, learned Counsel for the petitioner, submits that the petitioner has been an enlisted and registered Class II contractor with the MCD since 1985 i.e for the last over 20 years, and he had been executing contracts and works for the MCD on regular basis of value in the range of Rs.2 crores to 6.75 crores per annum. He further states that there has not been any complaint or adverse orders passed against the petitioner on any occasion by the MCD except the impugned order/circular. The registration of the petitioner as a Class II (Civil Contractor) granted on 29.3.2006 was to remain valid for 5 years w.e.f. 1.1.2006, and entitled` the petitioner to take up contracts having tendering limit of Rs.1 crore. The two work orders in respect of which the petitioner was held to have defaulted (both dated 25.1.2007) were issued under the Unit Rate Method (URM) system. The petitioner has been granted separate registration under the URM scheme vide registration No.EE (CC) Unit Rate/2006-07/122(403) dated 26.9.2006, vide letter dated 26.6.2007, and URM Registration No.EE/(P-III)/Unit Rate/07-08/D-243(399) dated 27.6.2007 vide letter dated 22.5.2008. He submits that, if at all, the respondent could have taken action in

respect of the registration obtained by the petitioner for executing URM works, since the works in respect of which default had occurred were URM works. The petitioners enlistment as a Class II contractor could not, and ought not to have been cancelled.

12. Mr. Rahul Gupta, learned counsel for the petitioner, submits that the impugned order/circular is patently harsh and disproportionate and fails to satisfy the Wenesbury principle of reasonableness. He submits that Clause 23 of the enlistment rules of 2008 provides the guidelines for taking disciplinary action against the defaulting contractors. From Clause 23, it appears that removal of the contractor from the approved list of contractors by the enlisting authority is amongst the most harsh actions that could be taken against the contractor, as milder actions could also be taken, such as to demote a contractor to a lower class, suspend business with him for any period, debar him or remove his name from the approved list of contractors for a definite period. The respondent had taken the most drastic action against the petitioner of removing the petitioner from the approved list of contractors indefinitely in respect of the petitioner's registration as a Class II contractor (which entitles the petitioner to tender for contracts having a tendering limit of Rs. 2 crores), even though the failure to execute the works was in respect of two URM contracts which are petty contracts having value of up to Rs. 2 lacs.

13. Mr. Rahul Gupta in support of his submission that the action taken against the petitioner is disproportionate has placed reliance on the following decisions:

1. Ex-Naik Sardar Singh Vs. Union of India and Others,
(1991) 3 SCC 213.

2. Om Kumar and Others Vs. Union of India, (2001) 2 SCC
386.

3. Indian Railway Construction Co. Ltd. Vs. Ajay Kumar,
(2003) 4 SCC 579.

**4. Coimbatore District Central Cooperative Bank Vs.
Coimbatore District Central Cooperative Bank
Employees Association and Another,** (2007) 4 SCC 669.

14. On the other hand Mr. Amit Paul, learned counsel for the respondent MCD submits that since the impugned order has been passed after affording reasonable opportunity of hearing to the petitioner and no case for malafides has been made out, the impugned order is valid. In support of his submissions he has relied upon **Himanshu J. Gupta Vs. Executive Engineer, R & D (Panchayat Division, Mehsana and other** AIR (2004) Gujarat 312, **Jagdish Mandal Vs. State of Orrisa & Ors** (2006) 14 SCALE 224 and **State of Madhya Pradesh and Others Vs. Lalit Jaggi** (2008) 10 SCC 607. It is further argued by Mr. Paul that it is the prerogative of the competent authority to decide the quantum of punishment to be imposed in a case which is governed by contract between the parties, and so long as the punishment is imposed in accordance with the agreed rules, and after following the procedure specified therein, the same ought not to be interfered by the Court. Along with reply filed to the review application, the respondent has placed on record the

document titled *“Expression of interest/tender notice for Unit Rate System for the year 2008-09”* dated 7.2.2008.

15. The “Enlistment Rules of 2008” states in Clause 2.1 that contractors already enlisted on the basis of rules hitherto in force shall be treated to be enlisted in their category and class with immediate effect, for a period of four years, subject to compliance of certain conditions. In regard to all other matters and further revalidation of their enlistment, they shall be governed by the Enlistment Rules of 2008. With regard to the categories and classes of enlistment it is stated in Clause 8 that enlistment shall be done in the categories and classes mentioned in Table I. The jurisdiction in which contractors enlisted in various categories and classes shall be permitted to tender, and the tendering limit up to which they shall be eligible to tender are also contained in Table I (See Clause 9). The enlistment in different categories and classes is done by different authorities. They have been identified in Table I (See Clause 10.0). Table I of the aforesaid enlistment rules classifies the contractors into two categories Viz: civil contractors and internal-external electrical installation contractors. Class I civil contractors are enlisted by an enlistment committee for Class I. Their tendering limit is Rs. 10 crores. Class II civil contractors are enlisted by an enlistment committee for Class II, and they enjoy a tendering limit of up to Rs. 2 crores. Pertinently, neither the enlistment rules of 2008 nor Table I thereof deal with URM contracts. Clause 5.0 of the Enlistment Rules of 2008 defines the scope of enlistment of a contractor in MCD shall only entitle him to be

considered for issue of tender papers. However, for award of URM contracts, no process of inviting of tenders is undertaken, and the work orders are issued by the Competent Authority in the concerned zone. The scheme evolved by the MCD under the Unit Rate System is stated in the tender notice dated 7.2.2008 as follows:

“The system is very simple i.e. once the rates for unit quantity of items of works is approved, the same is applicable for any number of works that are taken up zone wise over a specified period of time of one year. The willingness of the contractors and choice preference of zones for the approved unit rates will be obtained and agreement concluded for the approved Unit rates for a specified period of one year. There is no escalation of rates and scopes of arbitration etc. after agreement on Unit Rates are concluded. The scope for discretion in the allotment of works to any agency is obviated.

After the willingness of the contractors for approved unit Rates is received, zone wise list of contractors will be prepared and sent to S.E. concerned. On the basis of requirement of works in zone, estimates will be prepared on the approved unit rate and proper sanction with concurrence of finance shall be obtained and work orders will be placed. On the basis of number of works required, weekly draw of lots shall be made and works will be awarded to the contractors on rotation. The list of empanelled contractors and the unit rates finalized shall remain in force for a period of one year from the date of finalization but could be extended further after obtaining consent from empanelled contractors. The contractors whose names have been included in the list of contractors under the method will have no bar to take works under the normal procedure of tendering.....”

16. The tender notice for Unit Rate System for the year 2008-09 dated 7.2.2008 fixes the limit of each single work to be awarded under the said system at Rs. 5 lacs only. It appears that the earlier set limit

of Rs. 2 lacs was revised upward upto Rs. 5 lacs by the tender notice dated 7.2.2008. A perusal of Table I to the Enlistment Rules of 2008 shows that the lowest class of a civil contractor is in Class V, and a civil contractor enlisted under Class V is entitled to tender for works with tender limit of Rs. 7 lacs.

17. Consequently, the empanelment of contractors under the Unit Rate System or URM system is distinct from the enlistment of contractor under the Enlistment Rules of 2001 or Enlistment Rules of 2008. Under the Unit Rate System, the registration is done zone wise as is evident from the communications dated 26.6.2007 and 22.5.2008 issued to the petitioner by the Superintending Engineer (V) Central Zone and the Superintending Engineer (South) (I), South Zone. The URM registration number in respect of both the zones are also different. On the other hand the enlistment under the enlistment rules is a single enlistment for MCD valid for all areas/zones of MCD. No doubt, for registration as a URM contractor, enlistment as a contractor with the MCD appears to be a pre condition. However, this also shows that registration as URM contractor is different and distinct from enlistment as a contractor with the MCD.

18. Clause 23 of the enlistment rules of 2008 may now be reproduced. The same reads:-

“23.0 Disciplinary Actions:-

The contractor shall have to abide by all the instructions of enlistment and also by the terms and conditions of the contract and the Notice Inviting Tenders. He shall have to execute the works as per contract on time and with good quality. The enlisting authority shall have the right to demote a contractor to a

lower class, suspend business with him for any period, debar him or remove his name from the approved list of contractors indefinitely or for a period as decided by the enlisting authority after issue of show cause notice. Decision of the enlisting authority shall be final and binding on the contractor. The following actions of the contractor shall, in general, make him liable to disciplinary actions.

23.1 Demotion to a lower class:- The contractor shall be liable to demotion to a lower class, by the enlisting authority, if he;

- a) fails to execute a contract or executes it unsatisfactorily or is proved to be responsible for constructional defects; or
- b) no longer has adequate equipment, technical personnel or financial resources; or
- c) is litigious by nature; or
- d) violates any important condition of contract; or
- e) or his staff misconducts or misbehaves with MCD officials; or
- f) buys tender forms but fails to submit his offer on maximum of two occasions per calendar year; or
- e) is responsible for a conduct which may justify his demotion to a lower class; or
- g) any other reason which in view of enlisting authority is adequate for his demotion to a lower class.

23.2 Suspension of business:- The enlistment authority may suspend business with a contractor for indefinite period or for a period as decided by enlisting authority, pending full enquiry into the allegation, if the enlistment authority is prima facie of the view that the contractor is guilty of an offence in relation to business dealings which, when established would result in his removal/banning business and it is not considered desirable to

entrust new works or continue business with the contractor.

23.3 Removal from the approved list:-The name of the contractor may be removed from the approved list of contractors, by the enlisting authority, if he;

- A) has, on more than one occasion, failed to execute contract or has executed it unsatisfactorily; or
- B) is proved to be responsible for constructional defects in two or more works; or
- C) persistently violates any important conditions of the contract; or
- D) fails to abide the conditions of enlistment; or
- E) is found to have given false particulars at the time of enlistment; or
- F) has indulged in any type of forgery or falsification of records; or
- G) changes constitution of the firm or individual without prior approval of the enlistment authority; or
- H) changes permanent address/business address without intimation to the enlistment authority; or
- I) is declared or is in the process of being declared bankrupt; insolvent, wound up, dissolved or partitioned; or
- J) persistently violates the labour regulations & rules, or
- K) is involved in complaints of serious nature received from other department which prima facie appear to be true.
- L) Default in settlement of tax dues like income tax, contract tax, sales tax, octroi, duties etc.
- M) Has already been demoted for other reason(s); or
- N) Ceases to fulfill eligibility criteria based on which enlistment/revalidation was done, or
- O) Is considered not required to be in list of MCD for any other reason considered fit by enlistment authority."

19. On the basis of the aforesaid analysis, in my view the expression “contract” referred to in the Enlistment Rules of 2008 is a contract which the Contractor is awarded on account of his enlistment under the said Enlistment Rules after the issuance of a notice inviting tender, and not a contract awarded on account of his registration under the unit rate system as an URM Contractor. Therefore, the failure to perform the two URM contracts by the petitioner, in my view, could not have invited disciplinary action under clause 23 of the Enlistment Rules of 2008.

20. Pertinently, the tender notice for unit rate system for the year 2008-09 dated 7.2.2008 provides that in case a Contractor registered under URM for the year 2008-09 is black listed/barred from future tendering/or running under any disciplinary action in respect of the work executed in MCD, the registration of the Contractor will be cancelled and registration fee/performance guarantee will not be refundable. This means that an enlisted Contractor with the MCD, who additionally obtains registration as an URM Contractor, upon being black listed/barred for future tendering under the Enlistment Rules, would also lose his registration as an URM Contractor. However the converse has not been stated to say that an enlisted Contractor under the Enlistment Rules of 2008, who has also obtained registration as an URM Contractor, would lose his enlistment under the Enlistment Rules of 2008 on account of his registration as an URM Contractor being cancelled. In my view the scheme that emerges from a reading of the Enlistment Rules of 2008 and the tender notice dated 7.2.2008 is that the enlistment of the contractor being general and wider in its scope,

would not be cancelled merely on account of the enlisted Contractor failing to perform the URM contracts which are of a petty nature. However an enlisted Contractor who is awarded two contracts on account of his enlistment under the Enlistment Rules of 2008 after inviting a tender and, who fails to perform such a contract and thereby may lose his enlistment as a Contractor with the MCD, would also lose his registration under the unit rate system. This is also a logical consequence since enlistment of the Contractor appears to be a pre-condition to his being registered as an URM Contractor which is done zone wise. I am therefore of the view that on account of the failure on the part of the petitioner to perform the two URM contracts, the general enlistment of the petitioner as a Class II Contractor could not have been taken away.

21. Quite apart from my aforesaid view on the interpretation of the scope of enlistment under the Enlistment Rules and Registration under the unit rate system, I also find merit in the submission of learned counsel for the petitioner that the action taken by the respondent is highly disproportionate to the gravity of the default committed by the petitioner, and the withdrawal of enlistment of the petitioner as a class II Contractor from the approved panel of Contractors of MCD is rather harsh and unreasonable. The same cannot be sustained keeping in view the principle of proportionality which have been consistently followed by the courts. The Courts, on several occasions have struck down the disproportionate arbitrary penalty imposed by applying the principle of proportionality. In ***Ex-Naik Sardar Singh*** (supra), the Supreme Court struck down excessively severe punishment awarded

for a lesser degree of offence on the basis of principle of proportionality. The Court quoted with approval the following passage from ***Ranjit Thakur V. Union of India***, (1987) 4 SCC 611 where the Supreme Court considered the question of doctrine of proportionality in the matter of awarding punishment under the Army Act:-

“The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount if itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review.”

22. In ***Om Kumar*** (supra), the Supreme Court had occasion to elaborate on the Principle of Proportionality and how it has been consistently applied by the Courts in context of Articles 14, 19 and 21 of the Constitution. The Supreme Court explained the Principle as under:-

“28. By “proportionality”, we mean the question whether, while regulating exercise of fundamental rights, the appropriate or least-restrictive choice of measures has been made by the legislature or the administrator so as to achieve the object of the legislation or the purpose of the administrative order, as the case may be. Under the principle, the court will see that the *legislature* and the *administrative authority* “*maintain a proper balance between the adverse effects which the*

legislation or the administrative order may have on the rights, liberties or interests of persons keeping mind the purpose which they were intended to serve.” The legislature and the administrative authority are, however, given an area of discretion or a range of choices but as to whether the choice made infringes the rights excessively or not is for the court. That is what is meant by proportionality.”

23. Again in ***Coimbatore District Central Cooperative Bank*** (supra) the Supreme Court has explained the meaning of doctrine of proportionality as under:-

“18. “Proportionality” is a principle where the Court is concerned with the process, method or manner in which the decision-maker has ordered his priorities, reached a conclusion or arrived at a decision. The very essence of decision-making consists in the attribution of relative importance to the factors and considerations in the case. The doctrine of proportionality thus steps in focus true nature of exercise - the elaboration of a rule of permissible priorities.

19. de Smith states that “proportionality” involves “balancing test” and “necessity test”. Whereas the former (balancing test) permits scrutiny of excessive onerous penalties or infringement of rights or interests and a manifest imbalance of relevant considerations, the latter (necessity test) requires infringement of human rights to the least restrictive alternative. [*Judicial Review of Administrative Action* (1995); pp. 601-605; para 13.085; see also Wade & Forsyth; *Administrative Law*; (2005); p.366].”

24. The action that the MCD can take against a Contractor under the enlistment rules of 2008 are the following:-

- i. Demote the contractor to a lower class.
- ii. Suspend business with him for any period.

- iii. Debar him or remove his name from the approved list of contractors for a specified period decided by the enlisting authority.
- iv. Debar him or remove his name from the approved list of contractors indefinitely.

These actions can be taken after issuance of a show cause notice. Clause 23.3 enlists various situations in which the name of the Contractor *“may be removed from the approved list of Contractors, by the enlisting authority”*. Therefore, even if it were to be assumed that the two URM contracts in question, in respect of which the petitioner was a defaulter, are contracts within the meaning of clause 23.3 of the enlistment rules of 2008, the enlisting authority had the discretion whether or not to remove the petitioner from the approved list of Contractors. He could, just as well, have taken one of the milder action enumerated in clause 23.0, of which clause 23.3 is but a sub-clause.

25. As noted above, the contracts in respect of which the default had occurred were petty URM contracts i.e. contracts valued at not more than Rs.2 lakhs each. It is not that the petitioner was found, in relation to these petty contracts, to have displayed such conduct which would have a bearing on his performance of other contracts for the MCD, such as playing a fraud upon the MCD, or resorting to corruption or any other similar act or omission. The respondent MCD has also not sought to produce their record or other material to show what considerations went into the making of the impugned decision. In my view it was unreasonable and harsh for the respondent to have taken the most drastic action against the petitioner to remove the petitioner

permanently from the approved list of Contractors on account of the petitioner's failure to perform two petty contracts.

26. If the impugned action of the respondent is held to be justified in such circumstances, it would follow that in every case, where any two contracts have not been performed by the Contractor, the only action that the Enlisting Authority would be justified in taking would be to remove the Contractor from the approved list of Contractors. The enlistment rules have been framed to provide a guideline to the concerned authorities to act in an objective, consistent and uniform manner. Such a course of action would denude the enlisting Authority of its discretionary power to deal a milder punishment on the defaulter Contractor. That would also lead to a failure, on the part of the enlisting authority, to apply its mind to exercise its discretion in a reasonable manner after taking into consideration the facts of each case. In **Ajay Kumar** (supra), the Supreme Court held that an authority exercising a discretionary power *"must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case."*

27. One cannot lose sight of the fact that the permanent removal of a Contractor from the list of approved Contractors could deal a death blow to the business of the Contractor, particularly where the Contractor is an old and experienced Contractor who has been working for the MCD for decades. It is a well known fact that contractors who work for organizations like the MCD, which has ongoing projects, confine their business to transactions with such organization only, and

do not develop other business leads. To suddenly and permanently take away the enlistment of such a Contractor is bound to affect the business and livelihood of not only the Contractor, but his employees and workmen who depend on the Contractor for their livelihood.

28. Reliance placed by the respondent on **Himanshu J. Gupta** (supra) in my view is of no avail. That was a case where on account of the failure of the contractor to perform the contract, the contract was terminated and the contractor was black listed. From the judgment it appears that there was no argument on the aspect of proportionality of the black listing action taken before the Court. The Court formulated the question considered by it in these words:-

“14. The only question which now requires serious consideration for judicial adjudication is, as to whether both the impugned orders, namely, the order of terminating the contract and the order of black-listing the petitioner for a period of three years, are in any way affected, influenced or tainted by any extraneous consideration or impermissible ground.”

29. Therefore, I am not impressed by the submission of Mr. Paul based on this decision. The decision in **Jagdish Mandal** (supra) also appears to be of little relevance to the present case. In this case the Supreme Court was mainly concerned with judicial review of the State's decision to award a contract. In fact, the Supreme Court observed that in cases involving blacklisting or imposition of penal consequences of a tenderer/contractor or distribution of State largesse higher degree of fairness in action is required than what is applicable in matters of grant of tender.

30. In **Lalit Jaggi** (supra) the Hon'ble Supreme Court extracted para 26 from the decision in **Excise Commissioner v. Issac Peter** (1994) 4 SCC 104. It is that quotation which is relied upon by the respondent. In **Issac Peter** (supra) the Supreme Court held that the doctrine of fairness and duty to act fairly and reasonably is a doctrine which is developed in the administrative law field to ensure the rule of law and to prevent failure of justice, where the action is administrative in nature. However, this doctrine cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties. The mutual rights and liabilities of the contracting parties are governed by the terms of the contract and the laws relating to contracts. Contracts are entered into voluntarily and there is no compulsion on anyone to enter into a contract with a State.

31. In my view, the decision in **Issac Peter** (supra) or the decision in **Lalit Jaggi** (supra) has no application in the facts of this case. The impugned action taken against the petitioner though may be a result of the petitioner's breach of two URM contracts, it cannot be said that the removal of the petitioner from the approved panel of contracts is an action taken under the terms of the contract. The submission of learned counsel for the respondent that the Enlistment Rules of 2008 stood incorporated in the two URM contracts is not substantiated at all. Firstly, it appears that the Enlistment Rules of 2008 do not apply to URM contracts. Secondly, even if it were to be assumed that the Enlistment Rules of 2008 apply to URM contracts, it does not follow that the said enlistment rules become a part of the contract between the parties. The enlistment rules very clearly state as to what is their

scope. There is no term in the URM contracts in question to say that in case either or both of them are breached, the enlistment of the petitioner under the Enlistment Rules of 2008 could be withdrawn/cancelled.

32. I am not suggesting that a defaulting contractor should be let off the hook without any adverse consequences. However, where the defaults are relatively mild, proportionately mild action would be justified.

33. For the aforesaid reasons, I allow the aforesaid review petition as well as the writ petition and quash the impugned circular dated 19.5.2008 whereby the petitioner was removed from the approved list of Contractors of MCD on account of non-execution of the works awarded in respect of the two URM contracts vide two Work Orders dated 25.1.2007. However the respondent shall be entitled to take such other reasonable action against the petitioner as it may consider appropriate, and is permissible in law on account of the petitioner's default in performing the said contracts. Any such action, if proposed to be taken, shall be taken after issuance of a show cause notice and granting a hearing to the petitioner. Parties are left to bear their respective costs.

(VIPIN SANGHI)
JUDGE

MARCH 30, 2009
as/rsk