

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **WRIT PETITION (CIVIL) 8662/2008 & CM 16629/2008,
393/2009 and 728/2009.**

Reserved on : 13th March, 2009
Date of Decision : 1st May, 2009

X.O. FOOTWEAR P.LTD. Petitioner
Through: Mr. D.K. Rustagi, Adv. with
Mr. Mohd. Niyazuddin and
Mr. Vivek Kumar, Advs.
versus

THE COMMISSIONER OF POLICE & ORS. Respondents
Through: Mr. Anjum Javed with
Mr. Tanveer Alam, Adv. for
R-1 & R-2.
Mr. Gaurang Kanth and Mr. Rahul
Kumar, Adv. for R-3.
Mr. Rajat Navet, Adv. for R-5.

% **CORAM:**
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. By way of the present petition the Petitioner seeks to challenge a condition of the tender notice which specifies the type of process that is to be used to manufacture shoes, the subject matter of the tender.

2. The Petitioner is aggrieved by one of the tender conditions mentioned in the notice inviting applications. The grievance of the Petitioner is to the following criteria:

- (i) Oxford Shoes Black DIP PU Sole.

3. According to the Petitioner the condition in the Tender Notice for the supply of 26,794 Oxford Shoes Black DIP PU Sole is violative of the right to equality between manufacturers and as such violative of fundamental rights of the Petitioner to carry on the business. The Petitioner is further aggrieved that the said condition as stipulated in the Tender Notice is clearly supportive to the big business houses and discriminatory against the small business houses like the Petitioner.

4. A reading of the above criterion shows that for being eligible to participate in the tender, a manufacturer must use DIP (Direct Injection Process) for the manufacture of Oxford Shoes Black Colour to be supplied to the Respondents.

5. The assertion of the Petitioner is that there are two processes in Direct Moulding Process (DMS), with one process being the DIP and the other process being the Direct Pouring Process (DPP), and that the pouring process by which the Petitioner manufactures shoes is cost effective besides having all other features similar to injecting process including durability. The Petitioner contends that out of the 35-40 major manufacturers engaged in shoe making all over India, only 1/4th of them employ the "injecting process" whereas the remaining 3/4th of manufacturers employ the "pouring process", which is technically latest in the field as well as hugely cost effective in comparison to "injecting process".

6. It is thus the case of the Petitioner that the DIP as stipulated cannot be the part of specification and has been included only to exclude competition. The thrust of the Petitioner's argument is that the Respondent by inviting tenders from manufacturers of DIP PU

Sole Shoes is giving preference to a particular technology and thereby favouring few of the manufacturers, and that if the Respondents include the DPP process in the tenders then the number of competitors will be substantially higher, and the very purpose of 'floating tender' to invite more and more manufacturers would be achieved.

7. Therefore, the Petitioner prays for issue of writ of Mandamus thereby setting aside the tender notice for procurement of Oxford Shoes DIP PU Soles as opened on 3rd December, 2006, as discriminatory and manipulated to favour few selected manufacturers over others.

8. Per contra, on behalf of the Respondents it is urged that comfort and safety of Jawans is of paramount importance to the Respondent and, therefore, every care has been taken to ensure that best quality, comfortable and suitable shoes are made available to the Jawans. It is further urged on behalf of the Respondents that the Petitioner cannot dictate the terms of the tender to the Respondents since the tender terms and conditions have been prepared keeping in view the recommendations received from the Footwear Design and Development Institute (FDDI), and keeping in view the specific requirements of the Respondents' employees.

9. It is further submitted on behalf of the Respondents that though there are two processes i.e. Direct Injection Process and Direct Pouring Process of DMS technology, the Direct Injection Process yields better results than Direct Pouring Process, which is clear from the recommendations of the Director (Technical), FDDI. The answering Respondents have followed the recommendations of the

FDDI in the best interest of its employees.

10. Before advertizing to the merits of rival submissions made on behalf of the parties, it would be relevant to consider judicial pronouncements relied upon by the Respondents in this respect.

(i) In ***Directorate of Education and Others vs. Educomp Datamatics Ltd. and Others***; (2004) 4 Supreme Court

Cases 19 the supreme Court observed:

“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 favoritism. 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*, (1994) 6 SCC 651. After examining the entire case-law the following principles have been deduced(SCC pp. 687-88, para 94)-

‘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."

(ii) In ***Air India Ltd. vs. Cochin International Airport Ltd.*** (2000) 2 SCC 617, the Supreme Court observed:

"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. 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. It has been clearly held in the above 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 a tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Court would interfere with the

administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustment 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.

12. It is now, therefore, well settled law through a series of decisions rendered by the Supreme Court that the conditions of a tender cannot be challenged by a prospective bidder unless the conditions are totally unreasonable or whimsical.

13. In this background, we now consider the rival submissions made on behalf of the parties. In the present case it is seen that the Respondents were of the opinion that the Direct Injection Process yields better results than Direct Pouring Process.

14. This position was further substantiated by the stand taken by the FDDI, an expert in the field, to the effect that although high quality shoes could be produced by adopting both methods i.e. the DIP, as well as the DPP, however, the DIP is considered to be better option because there are certain features in machines used by DIP which are not there in machines used in DPP. The said features in the respective machines are as under:-

- (i) The RPM (Resolution Per Minute) in machines of Direct Injection Process is about 18,000 RPM, whereas the RPM in DPP is only 6,000 RPM to 8,000 RPM. Therefore, there is higher RPM of mixing in DIP.
- (ii) In DIP, the moulds are closed under high pressure and the injection of mixtures at higher pressure is done in closed modes.

15. In fact it would be relevant to extract the contents of the communication dated 14th May, 2001 addressed to the Director of Bureau of Police Research and Development by the Additional Director (Technical) of the FDDI. The relevant portion reads as follows:

“Direct injected polyurethane sole has been recommended considering its abrasion resistance, durability, flexibility, light weight thermal insulation, cushioning effect, good grip on wet surfaces, resistance to oil/petrol/solvents. Further to avoid hydrolysis (high temperature & high humidity) effect, polyether based polyurethane has been selected. In the different climatic conditions from Kashmir to Kanya Kumari “polyether based polyurethane is considered to be most comfortable soling material.”

16. It is observed that in keeping with the recommendations of the FDDI above, the Respondents in order to ensure the comfort and safety of its Jawans have stipulated the impugned condition to ensure that best quality, comfortable and suitable shoes are made available to the Jawans. Even otherwise, although an assertion has been made that the said impugned condition is by way of manipulation to benefit certain large manufacturers, no specifics of the cartelization have been forthcoming in the pleadings on behalf of the Petitioner, apart from the bald assertions.

17. In any event it was for the Respondent to set the terms of the tender. The Courts would not interfere with the terms of the tender notice unless it is shown to be either arbitrary or discriminatory or actuated by bias. While exercising the power of judicial review of the terms of tender notice, the Court cannot say that the terms of an earlier tender notice, as asserted by the Petitioner, would serve the

purpose sought to be achieved better than the terms of tender notice under consideration unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by bias. The condition of the terms inviting tenders from manufacturers of DIP PU Soles has not been shown to be either arbitrary or discriminatory or actuated by bias.

18. Insofar as, the present case is concerned nothing has been shown to us to suggest that the eligibility requirement in the tender document is unreasonable or arbitrary. What has been contended is simply that there is no difference in the quality of shoes manufactured by either of the processes mentioned hereinabove. As already discussed above, it is not for the Court to determine which process amongst the two is better, since that is a decision best left to experts, as has been done in the present case where the Respondent has relied on the advice of the FDDI.

19. In the result, the writ petition is devoid of merits and is hereby dismissed. However, in the circumstances it is dismissed with costs quantified in the amount of Rs.20,000/- which will be deposited by the Petitioner in the Registry of this Court by way of demand draft drawn in favour of the Registrar General of this Court within four weeks from today.

20. List for compliance on 29th May, 2009.

SIDDHARTH MRIDUL, J.

MADAN B. LOKUR, J.

May 01, 2009

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