

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

Date of decision: 7th January, 2011.

+ W.P.(C) 13906/2009 & CM No.15821/2009 (u/S 151 CPC for stay)

% M/S OM PRAKASH AND CO.

..... Petitioner

Through: Mr. M.M. Gangadeb with Mr. Sewa
Ram & Mr. R.K. Bachchan,
Advocates.

Versus

M.C.D AND ORS

..... Respondents

Through: Ms. Suparna Srivastava & Mr.
Anshum Jain, Advocates for MCD.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | No |
| 2. | To be referred to the reporter or not? | No |
| 3. | Whether the judgment should be reported
in the Digest? | No |

RAJIV SAHAI ENDLAW, J.

1. The petitioner is aggrieved from the action of the respondent MCD of, inspite of having taken a decision to hand over the operation and maintenance of public toilets to an outside agency and inspite of having taken out tenders for the same, not awarding the tenders to any person whosoever and keeping the operation and maintenance of the said public toilets to itself. The counsel for the petitioner has argued that the officials of the respondent MCD are not interested in entrusting the operation and maintenance to the outside agency because MCD is receiving funds for

maintenance of the said public toilets and which funds are being misappropriated. It is argued that implementation of decisions lawfully taken cannot be allowed to be so scuttled. It is the case of the petitioner that though the respondent MCD successively brought out four tenders for award of the contract but on each occasion, for some reason or the other, no tender was accepted. The petitioner in the writ petition claims the relief of directing the respondent MCD to open the financial bid of the petitioner (only whose technical bid was accepted) in pursuance to the fourth tender and to take a decision on the award of the tender expeditiously and to abstain from taking out any fresh tender for the same. The petitioner also claims damages from the respondent MCD for having deprived the petitioner from carrying on the business upon the tender being accepted.

2. Notice of the writ petition was issued. Counter affidavit and rejoinder have been filed. The counsels have been heard.

3. The public toilets have been classified by the MCD into three categories i.e. A, B & C. The counsel for the respondent MCD has argued that though the petitioner on each of the four occasions has bid for only category B & C toilets and never for category A toilets but has made vague allegations with respect to category A toilets also; it is informed that the contract with respect to category A toilets has been awarded. It is further argued that the bid of the petitioner in response to the first tender was found ineligible; that there was only one eligible bid at that time and it was decided

to not proceed with the matter without any competition; that though in response to the second tender, four bids were received but none of the bidders was found eligible and accordingly the process was abandoned; with respect to the third tender, it is stated that the same was also abandoned because only two companies participated and which was not found expedient for healthy competition; similarly, with respect to the fourth tender it is contended that the technical bid of the petitioner only was found eligible and the technical bid of the only other bidder was not found eligible and accordingly the process was abandoned. The counsel for the respondent MCD has further stated that with a view to broad base the bids, the tender is now being revised and a fresh Notice Inviting Tender will be issued shortly.

4. The counsel for the petitioner has rebutted the aforesaid case of the respondent MCD by contending that in response to the first tender, the petitioner was wrongly excluded. Reliance is sought to be placed upon the file notings of the respondent MCD in this regard. However, it is not deemed expedient to enter into the said controversy inasmuch as the relief claimed in the writ petition is with respect to the fourth tender only and not with respect to the first tender.

5. The reason given by the MCD for abandoning the fourth tender owing to the petitioner being the only eligible bidder therein cannot be faulted with. Even otherwise, the tender was merely a notice inviting offers and the

petitioner can have no right to insist that the offer made by the petitioner through his bid should be accepted by the respondent MCD. Undoubtedly, the Notice Inviting Tender did not contain the usual condition entitling the person inviting the tenders to cancel/abandon the process at any time. However, even in the absence of such stipulation, in law the person inviting tender cannot be forced to accept the best bid.

6. The Division Bench of this Court in *PES Installation (Pvt.) Ltd. Vs. AIIMS* MANU/DE/1273/2002 was faced with a similar argument. It was held that unless the cancellation of the tender is found to be arbitrary or irrational so as to attract the Wednesbury's principles of unreasonableness or wrath of Article 14 of the Constitution of India, the Court would not interfere. The judgment in *Tata Cellular Vs. UOI* (1994) 6 SCC 651 was relied upon to hold that the Government must have freedom of contract and the right to choose cannot be considered to be an arbitrary power unless shown to be exercised for collateral purpose. Reliance was also placed on *Air India Ltd. Vs. Cochin International Airport Ltd.* (2000) 2 SCC 617 to hold that the person inviting tenders may not accept the offer even though it happens to be the highest or lowest. The same principles were reiterated recently in *Shimnit Utsch India (P) Ltd. Vs. W.B. Transport Infrastructure Development Corp. Ltd.* (2010) 6 SCC 303 and it was held that the administrative discretion to cancel the entire tender process in public interest provided such action is not actuated with ulterior motive or is otherwise not

vitiated by any vice of arbitrariness or irrationality or is not in violation of any statutory provision cannot be taken away. Reference in this regard may also be made to *State of U.P. Vs. Vijay Bahadur Singh* (1982) 2 SCC 365, *Food Corporation of India Vs. Kamdhenu Cattle Feed Industries* (1993) 1 SCC 71, *Haryana State Agricultural Mktg. Board Vs. Sadhu Ram* (2008) 16 SCC 405, *Meerut Development Authority Vs. Association of Mgt. Studies* (2009) 6 SCC 171. In the present case, the reason stated by the respondent for abandoning/cancelling the fourth tender are found to be cogent and logical and in proper exercise of discretion. Another Division Bench of this Court in *S.B. Movers & Lifters (P) Ltd. Vs. Steel Authority of India Ltd.* MANU/DE/2995/2007 held that the only right of a bidder is to a fair consideration of its offer and which is found to have been done in the present case. Yet another Division Bench, recently in *Era Infra Engineering Ltd. Vs. DDA* 166 (2010) DLT 402 held that reasons for rejection of tender need not be communicated and a person merely for the reason of being the lowest bidder has no enforceable right to be awarded the contract.

7. The counsel for the petitioner has however contended that the respondent MCD has been repeatedly receiving monies from the petitioner under repeated tenders and though abandoning the tender process on its own, has not even been refunding the said monies.

8. The counsel for the respondent MCD in response thereto has drawn

attention to the notice inviting tender where the “application processing fee” of ₹20,000/- per Group has been described as “non-refundable”. The counsel for the petitioner states that since the petitioner had submitted the bid in both Groups B & C, he had submitted the processing fee of ₹40,000/- besides the costs of ₹5,000/- of each application form i.e. total ₹50,000/-.

9. The counsel for the petitioner has handed over in the Court a booklet containing the photocopies of the file notings of the respondent MCD. The counsel for the respondent MCD on the basis thereof states that the applications were processed and thus the processing fee deposited by the petitioner were consumed. It is further contended that the petitioner having deposited the same with the clear understanding that the same was not refundable, cannot be heard to complain about the same.

10. A perusal of the Notice Inviting Tenders does not disclose that the respondent MCD had informed therein that the tender process would be abandoned if there were less than any number of eligible bids or if there were no sufficient applications. Similarly, it was not provided that the tender process will be abandoned if the bids do not comply with various conditions. The bid of the petitioner in pursuance to the fourth tender having admittedly being found eligible, the MCD if deciding to abandon the tender process at that stage and opting to invite fresh tenders, cannot be heard to say that it is not liable to refund the amounts to the petitioner. The respondent MCD was entitled to the said amounts only if the tender process

had been taken to its logical conclusion and is not found entitled to retain the said monies having for its own reasons decided to abandon the process midway. Thus the petitioner is found entitled to refund a sum of ₹50,000/- deposited towards processing charges and tender fee of the fourth tender. The Supreme Court in *Ramgarh Cantonment Board Vs. State of Jharkhand* (2008) 11 SCC 223 in similar circumstances gave a similar direction, “keeping the well known legal principle of equity, fairness and good conscience in view”. As far as the claim of the petitioner for the said charges for the earlier tenders is concerned, the petitioner is not found entitled to the same, the petitioner having not pressed the said claim at that stage and having successively participated in the fresh tender.

11. With respect to the argument of the counsel for the petitioner that the respondent MCD is not giving effect to its decision to award the work of operation and maintenance of the public toilets of Group B & C category to the outside agencies and is scuttling the decision of the Standing Committee, the purpose would be served by directing the respondent MCD to, if of the view that it is best equipped to operate and maintain the said public toilets itself, have the said decision revoked altered from its Standing Committee or to implement the decision to award operation and maintenance of Group B & C public toilets also to private players.

12. The writ petition is therefore disposed of with the directions:-

- (i) to the MCD to in accordance with the decision of the Standing

Committee to either implement the decision of the Standing Committee with respect to the Group B & C public toilets also or to have the said decision revoked within six months from today.

(ii) to refund to the petitioner the sum of ₹50,000/- within four weeks of today failing which the MCD shall also be liable for interest thereon at the rate of 10% per annum from the date of payment to the date of refund.

No order as to costs.

Copy of this order be given *Dasti*.

**RAJIV SAHAI ENDLAW
(JUDGE)**

7th January, 2011
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