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

Decided on: 12.07.2017

\+ W.P.(C) 5790/2017

ANURADHA SHARMA ..... Petitioner

Through: Mr. Kirti Uppal, Sr. Adv. with Mr. Rajesh Gupta, Mr. Harpreet Singh, Mr. Abhimanyu Redhu and Mr. Pranjal Saran, Advs.

versus

NORTH DELHI MUNICPAL CORPORATION AND ANR ..... Respondents

Through: Ms. Mini Pushkarna, Standing Counsel, North DMC with Ms. Anushruti, Adv. along with Mr. R.K. Meena, ADC, RP Cell, North DMC.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE S.P.GARG

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

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CM No.24119/2017 *(exemption)*

Allowed, subject to just exceptions.

W.P.(C) No.5790/2017 & CM No.24118/2017 *(directions)*

1. The petitioner challenges the award of a tender by the first respondent (referred to as the MCD) for the New Shehnai Banquet Hall and Restaurant

at Asaf Ali Road, Delhi on licence basis for 5 years. The invitation to bid (hereinafter referred to as "NIT") in this case was issued on 18.01.2017.

2. The petitioner has somewhat a rather tumultuous history with respect to her claim for the banquet hall. She was awarded licence in 2001; later she claimed that the MCD had entered into an arrangement promising to convey the property to her absolutely. This dispute became the subject matter of a suit CS(OS) No.1590/2007. That suit is pending on the file of this Court. The petitioner contends that a sum of Rs.4.21 crores has been lying with the respondent – MCD, towards conversion charges and that they have not accounted for it. During the pendency of the suit, the petitioner repeatedly offered to take the premises on licence basis @ Rs.11 lakhs per month. This offer was however declined and became the subject matter of several applications. The use and management of the banquet hall was auctioned repeatedly on four occasions, but unsuccessfully, since no bid could be finalized. In this background and circumstances, the present NIT was issued on 18.01.2017. Materially, the tender enables individuals, concerns, firms and private companies to participate in the bid. Certain important disqualifications are contained in Clauses 1(c) and (d) which read as follows:-

> "1. **Eligible Bidders**
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> (c) Any individual / partnership firm / public limited company / private limited company / registered society / registered co-operative society / registered marketing association / registered RWA whose license has been cancelled / black listed / debarred in the past by any Central / State Govt. / **PSUs of Central & State Govt./Local Bodies including**

North, South & East DMC all over India, or any of its partner / proprietor / director / member have been **either** blacklisted for breach of terms and conditions of the agreement **or defaulted in making the payment of License/Contract Fee,** shall not be eligible for offering tenders and the individual / partnership firm / Public Limited Company / Pvt. Limited Company / registered society / registered co-operative society / registered marketing associations / registered RWAs shall be required to furnish an undertaking to this effect along with tender form.

(d) Any person/party/firm or registered parking contractor who is disqualified or ineligible to participate in the tender according to the aforesaid conditions shall not be qualified to offer the tender in the name of its associate concern subsidiaries/ principals/ front/ **related concerns in which he has substantial financial stakes/shows common addresses/common partners or Directors/ frequent financial transaction of huge amounts** and the commissioner/ authorized officer on his behalf may declare the tenderer disqualified on this ground, if he is of the opinion that the said tenderer is acting in collusion with for the benefit of any other party who would have been disqualified to participate in tender of his own. **The decision of the Competent Authority shall be final and binding on such bidders.**"

3. The turnover criteria required by the MCD reads as follows:-

"(*i*) **Turnover:** The Bidder must have a minimum average annual turnover of Rs.3,00,00,000/- (Rupees Three Crores Only) during the last 3 (three) Financial Years ending on 31.03.2016. The Bidder shall submit audited Balance Sheets/ Account Statement for each of the last 3 Financial Years duly certified by a Statutory Auditor/ Chartered Accountant. The said turnover and profit shall be solely from hospitality business or running/ managing eateries or banquet hall(s) or barat ghar(s)

> or indoor/ outdoor catering business and not with respect to any other business. The bidders should have PAN and TAN and should be registered with Sales Tax and Service Tax Departments etc. The bidders who have not cleared any past dues of Central/State Govt./PSUs of Central & State Govt./Local Bodies including North, South & East DMC or got blacklisted shall not be eligible for participation in NIT."

4. The petitioner sought for an ad interim measure/order in a pending suit, by filing IA No.1720/2017. The application was however disposed of by order dated 09.02.2017 and 10.02.2017. The Court recorded in its order (of 09.02.2017) as follows:-

> "4. The senior counsel for the plaintiffs has argued (i) that the properties have been wasted since 2010; (ii) that the defendant NrDMC has not been able to licence out the properties; (iii) that though the plaintiffs have from time to time, without prejudice to their rights and contentions, offered to take the properties on licence for the period for which the defendant NrDMC is offering the same on licence but the defendant NrDMC, out of personal prejudice for the plaintiffs, has not granted the said licence; (iv) that had such licences been granted, the defendant NrDMC would have earned large amounts therefrom and such personal prejudices of the defendant NrDMC are causing loss of public revenues; (v) that even now e-auction of Asaf Ali Road site is underway for which the bids have closed yesterday and the e-auction is to take place on 10th February, 2017; (vi) that however the plaintiff Anuradha Sharma concerned therewith was unable to make the bid because the defendant NrDMC has required qualification of annual turnover for food and beverages of Rs.3 crores which the plaintiff Anuradha Sharma does not meet, though has overall turnover of over Rs.3 crores. It is contended

that the said qualification has been introduced, again out of personal prejudice against the plaintiff.

8. The counsel for the defendant NrDMC states that the licence for which bid is invited is for three years only with renewal at the discretion of the defendant NrDMC for three successive terms of two years each.

10. A plaintiff in a suit for specific performance, as the plaintiffs in these two suits are, has no right with respect to the property for specific performance of the agreement with respect whereto the suit has been filed. Though there is no need for citing judgments on the proposition but reference may be made to ***Jiwan Dass Rawal Vs. Narain Das*** AIR 1981 Del 291, ***Cement Corporation of India Ltd. Vs. Life Insurance Corporation of India Ltd.*** (2014) 145 DRJ 148 (DB), ***Jagdambey Builders Pvt. Ltd. Vs. J.S. Vohra*** 228 (2016) DLT 49, ***Sunil Kapoor Vs. Himmat Singh*** (2010) 115 DRJ 229, ***Rajiv Ohri Vs. Anil Aggarwal*** 2013 SCC OnLine Del 3178 and ***Abbot India Ltd. Vs. Rajinder Mohindra*** (2014) 208 DLT 201 where it has been held that such a plaintiff has no right not even till a decree for specific performance is passed but till the conveyance deed in pursuance to the said decree is executed. Reference was made to Section 28 of the Specific Relief Act, 1963 to hold that after the decree for specific performance also, the plaintiff in a suit for specific performance has no rights.

11. The plaintiffs, for this reason, cannot be heard to dictate to the defendant NrDMC how it should deal with the property. The reliance by the senior counsel for the plaintiffs on Order XXXIX Rule 1(a) of the Code of Civil Procedure, 1908 (CPC) in this regard is misconceived, inasmuch as the same has application where all the parties of a *lis* have rights in the property. In such case, any of the parties can state that the property should not be permitted to be wasted. However when

the plaintiff has no right and its right is yet to be established, it cannot be heard to contend so."

5. In the order of 10.02.2017, after noticing the relevant contentions made in the light of the previous order, it was observed as follows:-

> "8. However, the same again is not under challenge. As I have already observed in yesterday's order, the plaintiff, who has made a claim of specific performance in this suit, has no right to the property and cannot in this suit seek a direction to the defendant NrDMC to deal with the property in a manner beneficial to the plaintiff.
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> 9. The counsel for defendant NrDMC has also contended that similar prayers made on two earlier occasions have been dismissed.
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> 10. For the same reason, the contention of the senior counsel for the plaintiff that no development work with respect to Minto Road property has been initiated, is also of no avail.
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> 11. There is no merit in the applications. Dismissed."

6. The petitioner urges that the second respondent Shri Harish Arora could not have been declared successful for two important reasons. It is urged that the said successful bidder, does not possess the requisite turnover eligibility and furthermore he was a persistent defaulter in respect of parking contract dues - awarded by different Municipal Corporations (SDMC, EDMC and North Delhi Municipal Corporation). It is next urged that the second respondent is a mere front for two individuals i.e. Deepak Kumar and K.S. Chauhan who were blacklisted by several Municipal Corporations for their acts of default. It is urged that the said individuals, have lent huge amounts to the petitioner and this itself constitutes a disqualification in terms

of Clause 1(d) of the NIT. It is lastly urged that the STCC certificate, which relates to the condition in Clause 1(*i*), was not furnished by the second respondent, and that this disqualified his bid.

7. The Standing Counsel for North Delhi Municipal Corporation was present on advance notice. The counsel produced the entire file relating to the consideration of the bids and the award of tender to the second respondent. The material part of the consideration by the Tender Evaluation Committee, which apparently took note of the complaints that formed the backbone of these proceedings reads as follows:-

> "The case for allotment of Shehnai Banquet Hall at Asaf Ali Road, New Delhi on License Fee basis through e-auction vide NIT No.2689 dated 18.01.2017 had been referred to by the Commissioner for examination by a committee. In this case against the e-auction, a single bid from M/s. Harish Kumar Arora had been received, which was at a higher price than the MRP fixed by the department. Before the case could be finalised a complaint was received from one M/s. Dharamvir Singh, 162/163 Vardhman Grand Plaza Sector-3, Rohini, Delhi. The committee looked into the complaint based on documents which had been submitted by the bidder. Clarifications were also obtained from the department and from the bidder in respect of the points made in the complaint. The following emerged from the examination:
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> > 1. The complainant stated that Mr. Harish Kumar Arora did not enclose STCC certificate with his bid which was mandatory as per the Clause 2 of Annexure 'C' of the terms and conditions of NIT. The department clarified that copy of STCC certificate had inadvertently appeared in the performa for details of bidders. On going

through NIT, the reference to STCC certificate was not found anywhere else and even STCC was not defined anywhere. It would appear that the Clause of STCC certificate in Annexure 'C' was included inadvertently possibly on account of improper editing of some previous document. This fact is immaterial.

2. Mr. Harish Kumar Arora did not enclose Sales Tax/VAT registration certificate as per Clause 1(i) of eligibility criteria of terms and conditions of NIT. The department clarified that Clause 6(c) of the draft agreement mentions that "licensee shall be liable to pay throughout the term of this agreement the Property Tax, Service Tax, Water Tax and any other applicable taxes, duties and levies required for the operation of the license premises". The applicability is determined on the nature of business/transactions performed by the bidder. The bidder also clarified that Sales Tax and VAT are not applicable in hospitality business. It was seen that the bidder had submitted registration for service tax and luxury tax, which should suffice for the present tender.

3. It has been alleged in the complaint that Mr. Harish Kumar Arora had bank transactions with Mr. Deepak Kumar who had been blacklisted by SDMC and as per clause 1(d) of the terms and conditions of the aforesaid e-auction any bidder who has bank transactions with defaulter individual/company cannot be allowed to participate in the said e-auction. It was also alleged that Mr. Deepak Kumar with whom Mr. Harish Kumar Arora had bank transactions alongwith Mr. K.S. Chauhan have been participating in various tenders as 'benami' and have more than Rs.10 crores outstanding dues against SDMC and NDMC. During the scrutiny of the papers, as

also after seeking the requisite clarifications, the said complaint could not be substantiated. It was noted that the spirit of the tender condition was to disallow associate concerns, subsidiaries/ principles/ front/ related concerns. Such violation has not been substantiated in the complaint.

4. It had been alleged that Mr. Harish Kumar Arora has operated several parking site of erstwhile MCD/NDMC including, B-6 Safdarjung Enclave, Parade Ground, MLUG Asaf Ali Road, Mall Kothi No.10, Panchsheel Marg etc. and he has more than Rs.5 crore outstanding dues towards corporation. After scrutiny and clarifications, this complaint also could not substantiated.

Even though the complaints made by Mr. Dharamvir Singh could not be substantiated as regard the fairness of the tendering process, the Committee on its own found it necessary to reverify the service tax registration of M/s. Harish Kumar Arora which is in the name of M/s. ABC outmedia. It was not clear whether this was in order and meets the requirements of the present tender. A reference was also made to the Commissioner, CBEC but it could not materialize. However, from the documents obtained from the department, it would be seen that a service tax registration no. is issued against a Permanent Account Number (PAN) only once. Hence the service tax registration issued to Mr. Harish Kumar Arora in respect of M/s. ABC outmedia will only be used by him for the present order after adding necessary details in respect of Shehnai Banquet Hall. This can however, be re-checked by the department before placing the final order on Mr. Harish Kumar Arora.

With the above deliberations, the Committee felt that further examination of the case will not serve any purpose and withholding the case based on the complaint is not recommended. The department may take further action as deemed fit."

"Sub: **<u>E-auction of Shehnai Banquet Hall on annual lease basis</u>**

A Committee under the chairmanship of Addl. Commissioner (Finance) was constituted by Commissioner vide O.O.No.D-41/CMR/NDMC/CC/2017 dated 15.2.2017 (page 44/C) with a view to fixing of Monthly Lease or Fee for each of the municipal property put under e-auctioning tendering process. The case of Shehnai Banquet Hall was examined by the Committee, which held a series of meetings.

The Committee examined the documents placed before it and found that only single bid (Harish Kumar Arora) was received which was found successful. However, during the interregnum period of meetings, a complaint against Shri Harish Kumar Arora was received from Shri Dharamvir Singh, 162/163, Vardhman Grand Plaza, Sector-3, Rohini, Delhi. The Committee looked into the complaint based on the documents which had been submitted by the bidder and other documents placed in the file. Clarifications were also sought from the department and from the bidder in respect of the points made in the complaint.

Accordingly, the Committee held its meeting on 19.5.2017 and discussed each and every point mentioned in the complaint, besides the documents placed in the file and minutes of the same were drawn (page 9/N and 10/N refers). Even though the complaint made by Mr. Dharamvir Singh could not be substantiated as regard the fairness of the tendering process, the Committee on its own found it necessary to reverify the service tax registration of M/s Harish Kumar Arora which is in the name of M/s ABC Outmedia. It was not clear whether this was in order and meets the requirements of the present tender. A reference was also made to the Commissioner, CBEC but it could not materialize. However, from the documents obtained from the department, it would be seen that a service tax registration number is issued against a Permanent Account Number (PAN) only once. Hence, the service tax registration issued to Mr. Harish Kumar Arora in respect of M/s ABC Outmedia will only be used by him for the present order after adding necessary details in respect of Shehnai Banquet Hall. This can, however, be rechecked by the department before placing the final order on Mr. Harish Kumar Arora.

The Committee concluded that the case facts as well as the complaint have been examined in detail and felt that further examination of the case will not serve any purpose and withholding the case based on the complaint is not recommended.

May like to apprise Commissioner please."

8. It was submitted that the second respondent fulfilled all the criteria i.e. Rs.3 crores annual turnover relatable to food and beverage business and that there were no dues required to be paid. So far as the STCC certificate is concerned, learned counsel submitted that the third respondent possessed PAN number as well as the TIN registration and that the requirement of STCC certificate was deemed to have been inessential during the tender evaluation process. It was further highlighted that since the petitioner did not participate in the bid, considering himself ineligible on account of the turnover criteria, the complaint made with respect to non-fulfilment of condition i.e. the absence of STCC certificate so far as the second respondent was concerned, is of no avail.

9. Learned senior counsel for the petitioner apart from reiterating the submissions, countered the MCD's argument with respect to STCC certificate, stating that had it been known to the public that such a condition i.e. STCC certificate was not essential, arguably, several other eligible

bidders would have participated. Learned senior counsel sought to submit that the certificate finds mention in Annexure C to the tender at column 2 and that in these circumstances, the MCD could not at the stage of tender consideration deem it to be an inessential document.

10. The facts would show from the above discussion that the petitioner kept away from the bidding process – mainly and principally on the ground that she was unable to fulfil the turnover criteria vis-a-vis the food and beverage business i.e. 3 crores annual turnover for the last 3 years. It is also a fact that apart from the second respondent, no other eligible bidder, with or without the documents participated in the process. Additionally, the Court has to be conscious of the fact that three operative previous attempts were made to auction the property on licence basis, the earliest commencing in 2011. If these facts are taken into account, what the Court is asked today – at the instance of a party who could not participate in the bid since she did not fulfil one of the concededly essential conditions of possessing a minimum turnover criteria for 3 years, is to scrutinize and set aside the entire process on the ground that another document is an essential condition.

11. There is undoubtedly a plethora of case law suggestive of the principle that both bidders and the public agency are governed by the norms created by the latter which operate till the award of the tender and that during the consideration of the process, the criteria cannot be changed. At the same time, what the Court here is to be satisfied before it proceeds to examine the decision of a public agency is whether the party moving it, had sufficient locus to do so and secondly, whether what is alleged to be essential is indeed so. Furthermore, the Court also has to confine itself to

the narrow bounds of jurisdiction in such matters i.e. interfere only on grounds of proven illegality, apparent procedural unfairness or a decision so unreasonable that no reasonable man could arrive at it. In the present case, there is no dispute that the petitioner not only did not fulfill the eligibility condition with respect to turnover, she also admitted to that in the pending civil proceedings (CS(OS) No.1590/2007). The petitioner's repeated efforts to have the licence, were rejected in those proceedings. On the other hand, the second respondent fulfilled the eligibility conditions and contrary to the petitioner's allegations, is not a defaulter. The official file of the MCD would reveal that no dues certificate, from each of the Corporations in Delhi, was obtained and taken into account, in order to be satisfied as to the genuineness or correctness of the allegations levelled. Having regard to these factors and the circumstance that the second respondent in fact is an income tax payee and has been showing 3 years' consistent returns of over Rs.3 crores and is not subject to any apparent disqualification, the Tender Evaluation Committee's decision saying that the STCC certificate was not needed and was included by inadvertence cannot be faulted. This Court thus, finds no arbitrariness in the award of the contract.

For the above reasons, the writ petition is without any merit and is dismissed.

S. RAVINDRA BHAT
(JUDGE)

S.P. GARG
(JUDGE)

JULY 12, 2017/kks