

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

Reserved on: 03.05.2018
Pronounced on: 22.05.2018

+ **W.P.(C) 4710/2018, C.M. APPL.18125/2018 TO 18127/2018**

THE INDIAN HOTELS COMPANY LIMITED Petitioner

Through: Dr. Abhishek Manu Singhvi, Sr. Advocate, Sh. Mohan Parasaran, Sr. Advocate, Mrs. Pallavi Shroff, Sh. Anuj Berry, Ms. Smarika Singh, Sh. Sourabh Rath, Sh. Saifur Rahman Faridi, Sh. P.S.S. Bhargava, Sh. Sidharth Sharma, Sh. Avishkar Singhvi and Sh. Abhik Chakraborty, Advocates.

Versus

NEW DELHI MUNICIPAL COUNCIL Respondent

Through : Sh. Sanjay Jain, Sr. Advocate with Ms. Malvika Trivedi, Sh. Akshay Makhija, Sh. Yoginder Handoo and Ms. Rhea Verma, Advocates.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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1. The writ petitioner (hereafter referred to as “the Indian Hotels”) seeks a direction to quash the tender (hereafter “NIT”) issued on 25.04.2018 by the New Delhi Municipal Council (NDMC), inviting bids for grant of leave and license of hotel property at No.1, Mansingh Road, New Delhi. It complains that an essential condition with respect to its unblemished track record has not been properly factored into the eligibility conditions and, therefore, contravenes the order of the Supreme Court dated 20.04.2017 in SLP(C) 33397/2016.

2. The necessary facts are that Indian Hotels had applied sometime in 1976 for participating in the construction of a hotel of international standards, which was accepted by the Union Works and Housing Ministry, resulting in allotment of No.1 Mansingh Road (hereafter “the hotel plot”) to NDMC on perpetual lease basis. NDMC entered into a collaboration agreement with Indian Hotels for the construction of the hotel and also executed a license agreement which was to be in force for 33 years. Consequently, a five star hotel was constructed and the license period commenced on 11.10.1978. Prior to the ending of the license period, Indian Hotels applied for extension and was granted extension upto 10.10.2012. On 05.11.2012, Indian Hotels was informed by the NDMC that it wished to auction the property hotel in question with the right of first refusal to it (the Indian Hotels). The latter sought reconsideration but upon not receiving any response, approached this Court with a suit for permanent injunction, being CS (OS) 651/2013. That suit was dismissed on 05.09.2016. The appeal met with the same fate with the Division Bench upholding the learned Single Judge’s ruling on 27.10.2016. It was in these circumstances that the Indian

Hotels applied for special leave under Article 136 to the Supreme Court, being SLP(C)33397/2016. On 20.04.2017, the SLP was rejected but the Supreme Court made the following directions:

“Application for impleadment is rejected.

Heard Mr. Harish N. Salve, learned Senior counsel appearing for the petitioner - the Indian Hotels Company limited and Mr. Sanjay Jain, learned Additional Solicitor General appearing for the New Delhi Municipal Council at length.

After perusing the material available on record, we do not intend to pass any order on this Special Leave Petition except that we allow the respondent - N.D.M.C. to hold the e-auction of the property in question, but at the time of holding such auction, they shall take into account the unblemished track record of the petitioner - Hotel as well as its capability. The respondent - N.D.M.C. shall consider all these aspects, in the peculiar facts and circumstances of this case, when they use their power under Section 141 of the New Delhi Municipal Council Act, 1994 and take a final decision in the matter.

After holding e-auction, if the N.D.M.C. comes to a conclusion to give the Hotel in question in favour of any other entity, in that event, it shall give breathing space of six months' time to the petitioner to vacate the hotel property, on filing of appropriate undertaking within a period of four weeks, from that date.

The Special Leave Petition is disposed of in the afore-stated terms. Consequent upon the disposal of the Special Leave Petition, pending applications filed in the matter are also disposed of.”

3. On 09.12.2017, the first tender document was issued by the NDMC inviting eligible bidders to submit offers for evaluation and selection of

successful bidders. Indian Hotels scrutinized all documents and addressed certain queries on 19.12.2017 to the NDMC which included the following:

“(b) Please clarify how the order has been addressed and been taken into account in the Tender Document. In particular, please confirm how the following provisions of the Order are being taken into consideration/given effect to in the Tender document and the bidding process as has been specified by the Honorable Supreme Court.

(c) Without prejudice to our query in (ii) above, at what stage of the bid process and in what manner does NDMC propose to give effect to the direction of the order as extracted above?”

4. The pre-bid conference took place on 27.12.2017, which discussed the pre-bid queries of various bidders. Apparently, it transpired in the meeting that the NDMC Advisor for e-auction – SBI Capital Markets had not submitted the petitioner’s pre-bid queries which was immediately followed-up by it on 27.12.2017 and a copy of those queries were supplied. Indian Hotels complains that no clarification was given at the pre-bid conference to its queries, especially queries regarding change in the eligibility conditions in the first document; it was stated on behalf of the NDMC in the pre-bid conference itself that there would be no change in the eligibility conditions as it had been settled after deliberations at the higher levels. Apparently, Indian Hotels was also told that the queries not addressed nor clarified in the pre-bid conference would be notified by the NDMC in terms of Schedule specified in clause 7.3 of the first tender document. It is stated that his assurance was ignored.

5. On 03.01.2018, a Corrigendum was issued (No.3) notifying the prospective bidders that publication of the responses to the pre-bid queries had been deferred to a later date. On 07.02.2018, again by notification, NDMC informed that publication of responses to pre-bid queries had been postponed and that the revised action timeplans would also be notified subsequently. The bid deadlines for hotel were extended to 21.02.2018. In the meanwhile, on 09.02.2018, upon coming across a news report, the petitioner addressed queries that NDMC had decided to relax the eligibility criteria and voiced reservation about the potential changes to the eligibility criteria, insisting that such recourse could not be made. Apparently, the pre-bid queries were not addressed and NDMC website indicated that the timelines for response to pre-bid queries was shifted till 07.03.2018. In these circumstances, on 25.04.2018, during the currency of the first tender document, another bid/offer was published. Indian Hotels complains that the publication of the fresh tender/NIT is unsustainable. It is contended that the respondents are duty bound to explain what pursued them to abandon or withdraw the existing first tender document and re-substitute it with the second one.

6. Indian Hotels' more fundamental objection to the new tender document, i.e. the impugned tender is that it does not incorporate the essential conditions mandated by the Supreme Court with respect to the taking into consideration of its unblemished track record (i.e. record of Indian Hotels). It is urged that this essentially goes against the court's mandate because the court was of the opinion that in the peculiar facts and circumstances of the case, when the NDMC uses its power to enter into the

contract, this should be factored in as relevant consideration having regard to Section 141 of the NDMC Act, 1994.

7. Dr. A.M. Singhvi, learned senior counsel for petitioner relies upon the Supreme Court rulings, especially *Shimnit Utsch India Pvt. Ltd. v. West Bengal Transport Infrastructure Development Corporation Ltd.* 2010(6) SCC 303 and *S. Nagraj v. State of Karnataka* 1993 (4) Supp 1595 to stress upon the finality of the court order and also that once a particular matter or aspect relating to tender conditions is finally decided by the highest court, the State authorities are bound by such determinations and cannot arbitrarily vary the conditions. It is submitted that there is complete vagueness with respect to the unblemished track record which had to be an essential condition for apt comparison of the bidders with the quality of services that the Indian Hotels all the while tendered, rendering the impugned tender suspect and untenable. Dr. A.M. Singhvi emphasizes on the process the bid envisioned and highlights that the focus in the documents, including those for the participation of bidders in e-auction and successful participation of bidders, was the license fee payable to NDMC, which is stipulated in clause 1.1.48 which defines “revenue share” as percentage of gross revenue which a qualified bidder offers to pay to NDMC if selected as the successful bidder. He stresses upon the fact that clause 6 of the NIT prescribes that the license fee is linked to the Gross Revenue, and the same is ascertained as a product of the Gross Revenue and the Highest Price Offer, being the highest Revenue Share Projection submitted by a qualified bidder. It is evident that the license fee payable is made contingent on the mere projection and the

revenue share has no correlation to the projected gross revenue that it shall be calculated against.

8. Dr. A.M. Singhvi claims that the tender mechanism shows absence of comparison parameters to scrutinize between revenue share and actual revenue projected to be earned by the bidder. It is stated that these terms are, therefore, irrational and arbitrary as it is possible for a bidder to quote a higher price for merely qualifying to stage two, but not in fact provide NDMC with higher license fee in case gross revenue is not high. Learned counsel relies upon *Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Ltd.* 2016 (16) SCC 818 to say that whilst judicial review does not ordinarily extend to reviewing tender conditions, nevertheless if the administrative action is illegal or patently unreasonable intervention is warranted.

9. Dr. Singhvi submits that even the bid process under the impugned tender document is flawed and arbitrary and leaves scope for unfairness and discrimination. Here it is stated that the tendering process is a two-stage process. At the first stage interested bidders are to submit technical bids regarding eligibility with the essential conditions along with the initial price bids (i.e. percentage of gross revenue). From this, the first fifty percent or the top five technically qualified bidders, whichever is higher, is qualified to participate in the second round e-auction i.e. the financial bid. The rest of the bidders are eliminated at this stage. Consequently, in terms of the NIT, the basis of shortlisting of the bidders from the technical and financial bid stage is the initial price offer. For instance A may quote initial price offer as 25% of the gross receipt, assuming it to be ₹150 crores, as licence fee and Bidder

B quotes the initial price offer as 20% assuming a Gross Revenue of ₹250 crores as licence fee. Although the initial price offer quoted by B would be higher in spite of quoting a lesser percentage than A, A would qualify for the financial bid since the percentage quoted by A is higher than B and B would be ranked lower than A with a higher chance of disqualification, even though he would have paid more license fee. This in itself defeats the purpose of the e-auction, which according to the Respondent NDMC is to achieve revenue maximization. This, it is pointed out, is an inherent flaw in the tender document in regard to the license fee as there is no correlation between the revenue share and the actual revenue projected by the bidder. Learned counsel also states that the NIT is *ultra vires* section 141 of the NDMC Act since the tender process by Clause 7 does not ensure revenue maximization. It is stated that the basic flaws pointed out go to the root of the revenue potentiality and consequently undermine the process, which would result in the contravention of Section 141.

10. Arguing for NDMC, Mr. Sanjay Jain, Senior Advocate submits that the NIT in this case was drawn after considerable application of mind and that the impugned tender is in fact an improvement upon the first tender document. It was also urged that Indian Hotels' concern with respect to the NIT insufficiently factoring its unblemished track record as well as its capability is insubstantial. It was submitted that the NIT/tender itself, in clause 1.1.20 defines what is a disclosure schedule by stating that it is the schedule attached as Annexure VII wherein NDMC has disclosed options available with it in regard to the hotel property.

11. Mr. Jain pointed out that Schedule VII, i.e. the disclosure schedule is nothing but the entire reproduction of the Supreme Court order of 20.04.2017 – in fact a copy thereof. It is pointed out that the bidders are, therefore, informed that the disclosure schedule was to be one of the factors which would be taken into account while evaluating the rival bids would be the nature of the unblemished track record and the quality of services provided by the Indian Hotels which would be taken as the guiding principle or one of the bench marks for evaluating competing bidders. It is stated that any tender received has to disclose that the participant, either itself or with a subsidiary or in partnership with a hotel brand has experience of operating a hotel with 500 rooms across at least five hotels/resorts located in India with a minimum of 5 star rating and at least each having a minimum of 5 star rating of 100 operations room. It was pointed out by Sh. Jain that so far as the minimal financial eligibility was concerned, the bidders were to fulfill these requirements whether they participate as a standalone entity or as participating together with subsidiary or by partnering with a hotel brand owner. The requirement stipulated was that there must be a turnover of ₹400 crores from hotel or resort operations for 3 years. Apart from that, the minimum net worth requirement as per audited financial account for FY 2016 had to be ₹300 crores for each class of hotels/bidders. It was submitted that the NIT/tender with respect to financial and other essential eligibility conditions is a very detailed one and only serious bidders can participate in it. Relying upon clause 8.2.2 it was stated that ₹26.68 crores had to be furnished as refundable security. In the event of issuance of a later award, in addition to performance security of ₹35,57,65,212/- the bidder has to furnish a substantial amount to the NDMC in the form of cash or unconditional

irrevocable on demand bank guarantee. It was also stressed that in the case of breach of condition of tender documents or if license deed was not executed, the NDMC can take action as specified under clause 8.2.4 with respect to the amounts furnished. These safeguards ensure that only serious bidders who have been put to notice about the nature of the services and the unblemished track record that would be taken into account, can in fact participate. Learned senior counsel also stated that in the event of the petitioner Indian Hotels not making the financial rounds of bid, it would nevertheless be assured a period of 6 months to vacate the premises.

12. Learned senior counsel submitted that the nature of details which have been factored in ensure that NDMC weighed in all the eventualities and has ensured that only serious bidders with full capacity to render quality service in fact participate and no other. It was submitted that the question of unblemished track record and nature of services is an inherent part of the tender process which would have to be evaluated after the rival bid unfolds and cannot be articulated in the manner that the petitioner wishes it. It was emphasized in this regard that neither Indian Hotels nor the Court can determine the appropriate manner of writing the tender or rewrite tender or other documents as is well settled in law. Learned counsel pointed that any tender condition with respect to the bid and the evaluation of financial position on the basis of gross revenue or turnover was arbitrary. It was submitted in this regard that once it is accepted that only serious bidders who would state genuine claims are allowed to participate, the question of anyone evolving their bids so as to make empty claims does not arise.

13. In issue, therefore, in the present writ proceeding is whether NDMC has accurately reflected the requirement spelt out by the Supreme Court in its final order, that the “*unblemished track record of the petitioner - Hotel as well as its capability*” should be taken note of. The concern at the back of the Supreme Court’s mind apparently was that the bidder should be able to provide services commensurate to that of Indian Hotels, in terms of its track record *as well as its capability*. How does one quantitatively assess a track record which involves qualitative assessment of service? It is not merely the turnover that the successful bidder would assure, which would of course yield a high revenue to the NDMC. Such qualitative criteria necessarily would have to be measured in some objective manner. NDMC pointed out that these objective parameters which have been factored in are that the bidder should have some association with an established hotel brand; its experience should be in 5 star hotels and that it should have a consistent *hotel turnover of four hundred crores*. NDMC also points out that the disclosure statement (Annexure VII) explicitly extracts the entire Supreme Court order, which is meant to put every bidder on notice that the unblemished track record of Indian Hotels and its capabilities would have to be matched.

14. Indian Hotels’ concerns and complaints about arbitrariness in the manner of framing the financial bid criteria might be of some use or might be valid. At the same time, what is worth keeping in mind is that NDMC seems to have factored in several eventualities – such as taken into consideration and formulated criteria for various contingencies- eligibility conditions for standalone bids, those based on subsidiaries as part of the

bidding documents; bids based on partnerships etc. In each of these contingencies, several parameters for the varied contingencies have been weighed in. Furthermore, NDMC insists that a successful bid has to pay a substantial non refundable upfront amount, in addition to over ₹35 crores as security through irrevocable bank guarantee. All these ensure that bidding standards are high and the level of competition is likely to be of an order comparable – to the best of NDMC’s efforts- with what Indian Hotels provided.

15. In *Afcons (supra)* relied on by the petitioner, the Supreme Court held that:

“In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner’s organization is taken. This ensures objectivity. Bidder’s expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be

called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

16. In *Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director &A nr v. CSEPDIT-Trust Consortium, rep. by its Managing Director &Anr*, (2017) 4 SCC 318, the Supreme Court, taking note of complex fiscal evaluation by public agencies, and other aspects, held:

“36. ... At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review.”

17. In *Michigan Rubber India (P) Ltd v State of Karnataka*, 2012 (8) SCC 216, the Supreme Court again emphasized how judicial review in regard to tender conditions is generally impermissible:

“(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work...”

18. If the above judicially settled parameters are kept in mind, it is apparent that the complex nature of eligibility conditions that NDMC has insisted upon, while considering tenders for the hotel plot, are based on thought and deliberation. The realm of re-appreciation through judicial review is consequently extremely narrow. To accept the petitioners' arguments would be to prefer what in the court's opinion would be (according to its subjective preference) a better criterion or criteria and an improvement over the existing ones. To apply that as the benchmark to judge the prescribed or existing criteria, would be to stray from the permissible margin of appreciation and impose a policy choice, which is what the Supreme Court has repeatedly cautioned against. As held by the Supreme Court, time and again, the wisdom of a particular policy cannot be considered, but its legality or procedural fairness is only subject to review. If these factors are kept in mind, the fact that some conditions could have been

better phrased, or that some more conditions could have been introduced is not sufficient to conclude that the conditions that have been prescribed are arbitrary and unreasonable.

19. In view of the foregoing reasons, this court is of the opinion that the writ petition has to fail. It is accordingly dismissed without order on costs.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MAY 22, 2018



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