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

% *Date of Judgment : 12th December, 2019*

+ W.P.(C) 4513/2019

JAGTAR SINGH

..... Petitioner

Through Mr. Aman Bhalla, Advocate

versus

DELHI METRO RAIL CORPORATION AND ANR..... Respondents

Through Ms. Vibha Mahajan Seth, Advocate
for respondent No.1/DMRC.

Mr. Chirag Alagh and Mr. R.K.
Alagh, Advocates for respondent
No.2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. Pleadings are complete.
2. With the consent of the parties, the writ petition is set down for final hearing and disposal at the admission stage itself.
3. The petitioner is primarily aggrieved by the action of respondent No.1 in awarding tender bearing Contract No.OPR-417 - "Licensing of Parking Rights at Kashmere Gate, Kanhaiya Nagar and Shastri Nagar Metro Stations of Line -1 of DMRC" in favour of respondent No.2 despite the fact that respondent No.2 was blacklisted by the South Delhi Municipal Corporation (SDMC) and Delhi Transport Infrastructure Development Corporation Limited (DTIDC).

4. Mr. Bhalla, learned counsel for the petitioner, submits that the Delhi Metro Rail Corporation (DMRC) has made an exception by incorporating Clauses v(a) and v(b) in the tender document. The said clauses are in contrast with the tender conditions, more particularly Clause (v) of the tender pertaining to the year 2017 and the tender pertaining to the year 2018. He submits that in view of the blacklisting, respondent No.2 could not have been awarded the tender in question.
5. Mr. Alagh, learned counsel for respondent No.2 submits that the orders of blacklisting stand stayed by the decision of a learned Single Judge of this Court in W.P.(C).No.6605/2018 titled ***Dhiraj Gupta v. South Delhi Municipal Corporation and Anr.***, and W.P.(C).No.6568/2018 titled ***Dhiraj Gupta v. Delhi Transport Infrastructure Development Corporation Limited***. Additionally, learned counsel for respondent No.2 submits that once the petitioner has participated in the tender, he cannot challenge the terms of the tender.
6. Ms. Mahajan, learned counsel for respondent No.1/DMRC, submits that the terms of invitation to tender are not open to judicial scrutiny for the reason that the invitation to tender is in the realm of contract. She submits that the terms of the tender being contractual in nature, the authority publishing the tender is fully authorized to change the terms of tender, unless any allegation of *mala fide* or unreasonableness is made. She submits that no ground has been raised to show that the action of respondent No.1 is clothed with malice or is a case of mischievous exercise of administrative powers. Ms. Mahajan further submits that since respondent No.1 was finding it difficult to keep a track whether a bidder had been debarred or blacklisted, a modification

was made in the terms of the tender requiring a bidder to furnish a declaration/undertaking to the effect that it had not been blacklisted and, to that extent, the clause was made stricter to discourage the blacklisted bidders from participating in the tendering process. She submits that a reading of the tender document in its entirety highlights that there exist various deterrents and stringent conditions which would not allow blacklisted persons to participate in the tendering process. Ms. Mahajan further submits that the petitioner is not new to the subject-matter of DMRC tenders since two previous tenders, in which the petitioner had participated, also contained the same clause which is the subject-matter of the present writ petition.

7. We have heard learned counsels for the parties and have considered their rival submissions.
8. Before we examine the rival contentions of the parties, we deem it appropriate to revisit the law laid down with regard to the scope of judicial review of the terms of a tender. In the case of ***Directorate of Education v. Educomp Datamatics Ltd.***, 2004 (4) SCC 19, in paras 9, 10 and 12, it was held as under:

*“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 favouritism. 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.”*

(emphasis supplied)

“10. In *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617] this Court observed: (SCC p. 623, para 7)

“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 procedure 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.”

(emphasis supplied)

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“12. It has clearly been held in these 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 the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments 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.”

9. In the case of *The Indian Hotels Company Limited v. New Delhi Municipal Council*, W.P.(C). No.47100/2018 decided on 22.05.2018, a Division Bench of this Court, in paragraphs 1, 15 to 18, has held as under:

“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.

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“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. CSEPDITrishe 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.”

10. Furthermore, in the case of ***State of Jharkhand Vs. CWE-Coma Consortium***, (2016) 14 SCC 172. In paras 13 and 22, it was held as under:

“13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant v. Satyawar [Laxmikant v. Satyawar, (1996) 4 SCC 208] , Rajasthan Housing Board v. G.S. Investments [Rajasthan Housing Board v. G.S. Investments, (2007) 1 SCC 477] and U.P. Avas Evam Vikash Parishad v. Om Prakash Sharma [U.P. Avas Evam Vikash Parishad v. Om Prakash Sharma, (2013) 5 SCC 182 : (2013) 2 SCC (Civ) 737]).

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“22. The Government must have freedom of contract. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. [Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138], SCC in para 12 this Court held as under: (SCC p. 147)

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the

manner in which the decision was made. 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. The Government must have freedom of contract. In other words, 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 principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)”

The Court does not have the expertise to correct the administrative decision as held in Laxmikant v. Satyawar [Laxmikant v. Satyawar, (1996) 4 SCC 208], the Government must have freedom of contract.”

11. In the present case, in our view, the petitioner having once participated in the tender, cannot challenge the terms of the tender. We are convinced with Ms. Mahajan’s submission that in the absence of any *mala fides* having been alleged, the Court cannot re-write the terms of the tender in view of the decision of a Division Bench of this Court in the case of **Kalyan Health Care Products & Pharmaceuticals Through Yogesh Jindal v. Govt Of NCT Of Delhi** in W.P.(C) 7010/2019 wherein the Court held as under:

“9. The scope of interference in tender matters under Article 226 of the Constitution of India is restricted to the decision making process not the decision. The Hon’ble

Supreme Court in Tata Cellular v. Union of India, (1994 (6) SCC 651) has held that the Courts can only interfere in the decision making process and not the decision and certainly judicial interference cannot extend to re-writing a tender document. We quote paras 70, 74 and 77 of the judgment in the case of Tata Cellular (supra) as under:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no W.P.(C) No. 7010/2019 Page 4 of 13 question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

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74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself.

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77. The duty of the court is to confine itself to the question of legality. Its concern should be: (i)

Whether a decision making authority exceeded its powers? (ii) Committed an error of law, (iii) Committed a breach of rules of natural justice, (iv) reached a decision which no reasonable tribunal would have reached or, (v) Abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationally, namely Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact in R.V. Secretary of State for the Home Department, ex Brind Lord Diplock (1991) 1 AC 694, Lord Diplock refers specifically to one development namely, the possible W.P.(C) No. 7010/2019 Page 5 of 13 recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should “consider whether something has gone wrong of a nature and degree which requires its intervention.”

12. Additionally, in view of the fact that a learned Single Judge of this Court has already stayed the blacklisting orders against respondent No.2; and the tender also having been awarded as far back as in March, 2019, the objections of the petitioner cannot be entertained.
13. We accordingly find no ground to entertain the writ petition. The writ petition is therefore dismissed.

CM.APPL 20097/2019(stay)

14. The application also stands dismissed in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

DECEMBER 12, 2019
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