

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**
W.P.(C) 3811/2020 and CM APPL. 13652/2020

Date of decision: 21st July, 2020

IN THE MATTER OF:

MANMEET SINGH

..... Petitioner

Through: Mr. A.S. Chandhiok, Senior Advocate with Mr. Soayib Qureshi, Mr. Ritesh Kumar, Mr. Tejasvi Chaudhry and Ms. Simran Kohli, Advocates

versus

SOUTH DELHI MUNICIPAL CORPORATION

.....Respondent

Through: Mr. Sanjay Poddar, Senior Advocate with Ms. Aakanksha Kaul, Mr. Govind Kumar, Mr. Tushar Yadav and Mr. Manek Singh, Advocates and Mr. P.S. Jha, DC, RP Cell.

AND

W.P.(C) 4020/2020 and CM APPL. 14417-19/2020

RAJESH KUMAR SINGH

..... Petitioner

Through: Ms. Manmeet Arora, Mr. Pratap Singh Parmar and Mr. Tarang, Advocates

versus

SOUTH DELHI MUNICIPAL CORPORATION

.....Respondent

Through: Mr. Sanjay Poddar, Senior Advocate with Ms. Aakanksha Kaul, Mr. Govind Kumar, Mr. Tushar Yadav and Mr. Manek Singh, Advocates and Mr. P.S. Jha, DC, RP Cell.

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

HIMA KOHLI, J

1. Both the petitioners are aggrieved by the communications dated 19.06.2020, issued by the respondent/South Delhi Municipal Corporation (in short, 'SDMC'), informing them that the Competent Authority had decided to recall the entire e-auction tendering process in respect of NIT No.1176 dated 16.03.2020, for e-auctioning six multilevel parking sites within the SDMC jurisdiction. As a result thereof, the offers communicated to the petitioners on 15.05.2020, declaring them as H1 bidders in respect of two multilevel parking sites each, were withdrawn and the advance monthly licence fee and security deposit/performance guarantee deposited by them were directed to be returned.

2. As the factual matrix in both the cases is almost similar, for the sake of convenience, we shall be referring to the facts narrated in W.P.(C) 3811/2020.

3. On 16.03.2020, the respondent/SDMC took steps to invite bids from eligible bidders for regular allotment of six authorized multilevel parking sites in its jurisdiction. In response to the NIT, the petitioner submitted his bids and on 28.04.2020, he was declared as the successful bidder in respect of two multilevel parking sites namely, Hauz Khas (with surrounding surface parking) multilevel underground parking and Kalkaji multilevel parking. On 15.05.2020, the respondent/SDMC issued Offer letters to the petitioner informing him that the Tender Evaluation Committee had found him to be the H1 bidder, eligible to be offered the aforesaid sites for a period of five

years (3 years + 2 years) and that he was required to submit the documents mentioned in the said letter alongwith the requisite fee. Vide email dated 18.05.2020, the petitioner accepted the terms of the Offer letters and proceeded to make requisite compliances, as directed. On 29.05.2020, the petitioner also furnished bank guarantees to the respondent/SDMC in respect of both the sites.

4. Upon failing to hear from the respondent/SDMC thereafter, the petitioner submitted a representation dated 22.06.2020 to the respondent/SDMC, requesting that possession of the parking sites be handed over to him. However, on the very same day, at 11:30 PM, the petitioner received two emails from the respondent/SDMC informing him that it had decided to withdraw the communications dated 15.05.2020 and refund the licence fees and security deposits. For purposes of ready reference, the content of one of the communications dated 19.06.2020 is reproduced hereinbelow:-

"This has reference to the bid process bearing NIT No. 1176 dated 16.03.2020 regarding e-auction of parking sites at Kalkaji Multilevel underground parking. In terms of clause 12 of tender document, the Competent Authority has decided to recall the entire e-auction tendering process by cancellation of the above-mentioned bid process.

In view of above, the offer communicated vide this office letter No.AC/RP Cell/SDMC/2020/D-29 dated 15.05.2020 is hereby withdrawn & the advance MLF amounting to Rs.9,03,681/- & the Security deposit/performance guarantee equal to Rs.25 Lakh are returned herewith.

Please acknowledge the same.

This issues with the prior approval of the Competent Authority."

5. It is not in dispute that though the aforesaid communication bears the date of 19.06.2020, the same was received by the petitioner as an enclosure to the email dated 22.06.2020, timed as 11:30 PM, addressed by the Assistant Commissioner, (RP Cell), SDMC. Aggrieved by the impugned cancellation letters issued in respect of both the parking sites, the petitioner has approached this court, seeking directions to the respondent/SDMC to hand over possession of the two parking sites in respect whereof he was declared as H1 in terms of the Offer letter dated 18.5.2020.

6. Mr. Chandhiok, learned Senior Advocate appearing for the petitioner commenced his submissions by narrating the following sequence of events. Seven bids were received by the respondent/SDMC in terms of the NIT issued on 16.03.2020. On 12.05.2020, on opening the technical bids, four bidders were disqualified, thus leaving three bidders (out of whom, two have filed the subject writ petitions). On the very next day, i.e., on 13.05.2020, the e-auction had taken place, wherein the petitioner was successful in respect of two bids relating to the Kalkaji and Hauz Khas multilevel parking sites. We may note that the petitioner in W.P.(C) 4020/2020 was declared as H1 in respect of the New Friends Colony (two floors) parking and the Munirka multilevel parking. On 15.05.2020, two letters of offer were issued to the petitioner in respect of the two parking sites, which were unceremoniously cancelled on 19.06.2020, intimation whereof was received by the petitioner in the late hours of 22.06.2020.

7. Learned Senior Advocate contended that once the petitioner had complied with the terms and conditions laid down in the Offer letter dated 15.05.2020, the said document ceased to remain an offer letter and ought to be treated as a concluded contract. To substantiate the said submission,

reference was made to the contents of the Offer letter dated 15.05.2020, which concluded by stating that the same had been issued with the prior approval of the Competent Authority. It was submitted that as a matter of fact, the communication dated 15.05.2020, though described as an "Offer letter", was an acceptance letter inasmuch as the respondent/SDMC had accepted the petitioner as the H1 bidder, eligible for allotment of two parking sites for a period of five years and all that was left to be done on the part of the petitioner was to furnish the relevant documents and the fee prescribed by the respondent/SDMC, which he had duly complied with. This included acceptance by the petitioner of the Offer letter within seven working days, submission of the security deposit/performance guarantee, deposit of advance licence fee for three months, payment of the auction processing charges to the service provider, submission of the print of the contract agreement on a non-judicial stamp paper of Rs.100/-. Thus, it was canvassed that the petitioner having discharged his obligations, the contract was complete in all respect and all that was left to be done on the part of the respondent/SDMC was to hand over the parking sites to him, which it has arbitrarily, failed to do.

8. The next submission made by Mr. Chandhiok, learned Senior Advocate was in the context of Clause 12 of the tender documents , which is reproduced hereinbelow for ready reference :-

"12. Allotment Letter:

The bid (including negotiations, if any) submitted by the agency shall be subject to acceptance by the Commissioner, SOMC or any other officer/authority authorized under DMC Act. The offer once accepted, shall be final and binding upon the parking contractor/agency. The agency shall be liable to complete all the requisite formalities (including but not limited to deposition of security deposit/performance guarantee,

advance MLF as mentioned in Annexure-9), as specified in working letter, within seven working days of issue of the same and thereafter a formal allotment letter shall be issued to the H-1 parking contractor/agency. Any offer/permission granted by the competent authority 'may/can' be withdrawn, any time without assigning any reason thereof."

9. The argument advanced was that the aforesaid clause clearly states that *"the offer once accepted, shall be final and binding upon the parking contractor/agency"* and once the respondent/SDMC had accepted the offer of the petitioner, the said clause would apply with equal force to the SDMC which was under an obligation to complete the remaining formality by handing over possession of the two parking sites to the petitioner and issuance of the *"formal allotment letter"* referred to in Clause 12, was a mere procedural formality. Learned Senior Advocate argued that in any event, the respondent/SDMC could not have resorted to Clause 12 of the tender documents to cancel the bid process inasmuch as the said clause only contemplates that *"any offer/permission granted by the competent authority may/can be withdrawn, any time without binding assigning any reason thereof"* and the respondent/SDMC hasn't withdrawn the Offer letters dated 15.05.2020, in terms of the said clause. Instead, the entire tender process has been scraped by the respondent/SDMC under the garb of invoking Clause 12. Thus, the impugned cancellation letters dated 19.06.2020 issued by the respondent/SDMC are not in terms of Clause 12 of the tender documents and are liable to be quashed. It was submitted that once reference to Clause 12 of the tender documents is held to be arbitrary, then the natural inference would be that the Offer letters dated 15.05.2020, could not have been withdrawn and the contract between the parties would continue to subsist and have a binding effect on the respondent/SDMC. It was also submitted that

without bothering to serve the cancellation letters dated 19.06.2020 on the petitioner, the respondent/SDMC has arbitrarily proceeded to issue a fresh tender notice on 22.06.2020, which is impermissible.

10. To substantiate the submission that the impugned letters of cancellation do not offer any reason for the extreme steps taken by the respondent/SDMC of scrapping the tender and any explanation for the same sought to be offered by the respondent/SDMC in its counter affidavit, cannot be read into the cancellation letters for converting them into a speaking order, learned counsel for the petitioner cited Mohinder Singh Gill and Anr. vs. The Chief Election Commissioner, New Delhi and Ors. reported as **(1978) 1 SCC 405** reiterated by a co-ordinate Bench of this Court in a recent judgment dated 03.03.2020 in **W.P.(C) 952/2017** entitled Reebok India Limited vs. Union of India and Anr.

11. Ms. Manmeet Arora, learned counsel for the petitioner in W.P.(C) 4020/2020 has supplemented the arguments advanced by Mr. A.S. Chandhiok, learned Senior Advocate and contended that once the petitioners had taken steps to deposit the requisite licence fee and security deposit in terms of Clauses 2 and 3, submit a non-judicial stamp paper worth Rs.100/- in terms of Clause 4 and deposit the e-auction fee, which could only have been deposited by a successful bidder in terms of Clause 5 of the Offer letter dated 15.5.2020, a concluded contract had come into force and any breach thereof would attract the provisions of Section 73 of the Indian Contract Act, 1872 which entitles the petitioners to claim compensation for losses/damages caused to them on account of the breach of the contract by the respondent/SDMC.

12. Learned counsel also alluded to Clause 8 of the Instructions to the Bidders that forms a part of the tender documents and stipulates that the successful bidder shall have the exclusive right for implementation of the project for the award period, i.e., for five years (3 years + 2 years), to urge that this clause ought to be treated as a negative covenant in favour of the petitioner in terms of Section 41(e) of the Specific Relief Act, 1963 that contemplates that no injunction can be granted to prevent the breach of a contract, performance whereof would not be specifically enforced.

13. Ms. Arora, learned counsel also adverted to sub-clause (b) of Clause 10 of the tender documents that deals with acceptance of auction/bid and prescribes that the offer/bid made by the bidder shall be subject to acceptance by the Competent Authority or an authorized officer of the SDMC and Clause 12 that deals with issuance of the Allotment letter, to contend that the language used in the aforesaid clauses make it clear that the '*offer*' has to be made by the bidder and not the SDMC and therefore, the communication dated 15.05.2020, issued by the respondent/SDMC and termed as an "Offer letter", is nothing but an acceptance letter in response to the offer made by the petitioners, which could not have been cancelled by the respondent/SDMC unilaterally. Lastly, it was submitted that in any event, the second para of the Offer letter dated 15.05.2020 records that the Tender Evaluation Committee had found the petitioners as the eligible H1 bidders and this goes to show that an independent satisfaction had been arrived at before issuing the said document.

14. Mr. Sanjay Poddar, learned Senior Advocate appearing for the respondent/SDMC countered all the submissions made by the other side and asserted that the petitioners were only made an offer to run the multilevel parking sites for a specific period but no allotment letters had been issued in

their favour in terms of the NIT and therefore, the contract had not matured much less, concluded. He sought to explain that certain subsequent developments had taken place after 15.05.2020 that left no option with the respondent/SDMC but to cancel the entire tender process and issue a fresh NIT, which are as follows:-

- (a) **28.05.2020** – A complaint in respect of the subject tender made by the Chairman, Standing Committee, SDMC was received by the SDMC on 29.5.2020.
- (b) **10.06.2020** – Members the Standing Committee, SDMC addressed a joint letter to the Commissioner, SDMC requesting him to examine a complaint received by them from a party alleging mismanagement of the subject tender.
- (c) **16.06.2020** – Commissioner, SDMC constituted a 9 Member Committee headed by the Additional Commissioner, SDMC to examine the entire tender process in the light of the complaints received/forwarded to him.
- (d) **17.06.2020** – The Committee submitted its report to the Commissioner, SDMC stating *inter alia* that there was a possibility of cartel formation among the three successful bidders, who had participated in the online e-auction process. The Committee recommended that the tender process be recalled, e-tender process be adopted instead of the online e-auction mode, the tender conditions be revisited and the reserve price offered in respect of each of the six multilevel parking sites be raised.
- (e) **17.06.2020** - Recommendations of the Committee were duly accepted by the Commissioner, SDMC.

- (f) **19.06.2020** – SDMC prepared letters for cancellation of the tender process.
- (g) **22.06.2020** –NIT documents were redrafted and sent by the R.P. Cell to the IT Department for issuing fresh advertisements.
- On the same day, the said NIT was uploaded on the website of the SDMC.
 - the petitioners received the cancellation letters dated 19.06.2020, through e-mail on 22.06.2020 at 11.30 PM.
- (h) **23.06.2020** – Fresh NIT issued by the respondent/SDMC was published in several newspapers.

15. Mr.Sanjay Poddar, learned Senior Advocate thus explained that the recommendations made by the Committee constituted by the Commissioner, SDMC to examine the tender process clearly notes in para 10 that a cartel had been formed by the bidders, who elected to participate in the auction activity on 13.05.2020, at the fag-end of the day, though the window for conducting the e-auction was open from 11.00 AM to 5.35 PM. A flurry of activity took place only in the last 15-20 minutes and the result was that each of the three bidders managed to bag two bids each by depressing their bids and accommodating each other.

16. To rebut the contention of the other side that since the impugned communication dated 19.06.2020, is a non-speaking one and does not furnish reasons for withdrawing the Offer letters issued to the petitioners it ought to be quashed, learned counsel cited the decision in Ghanshyam Das Aggarwal v. Delhi Development Authority reported as **1996 (37) DRJ (DB)** and submitted that the terms and conditions of the tender document did not contemplate that any reasons be given for rejection of the highest bid and in

any case, the reasons for cancelling the entire tender have now been placed before this Court for its perusal.

17. On the scope of judicial review in matters relating to tenders, learned counsel cited a recent decision of the Supreme Court in Municipal Council Neemuch v. Mahadeo Real Estate and Ors. reported as **2019 (10) SC 738** and contended that the respondent/SDMC cannot be faulted for directing re-tendering as the object is to obtain the best price available for operating the multilevel parking sites, constructed at the cost of the SDMC. He vehemently disputed the plea taken by the other side that once the Offer letter had been issued by the respondent/SDMC, the contract stood concluded in all respects. He submitted that no letter of allotment has been issued in favour of the petitioners and nor has the physical possession of the parking sites been handed over to them and therefore, there was no concluded contract. The decision of the Supreme Court in Rishi Kiran Logistics P. Ltd. v. Board of Trust of Kandla Port, reported as **2015 (13) SCC 233**, was also cited to urge that if the petitioners have a grievance against the respondent/SDMC of having breached the terms of the contract then, they are free to exercise the civil remedies that may be available to them.

18. In response to the submissions made on behalf of the petitioners that adequate publicity was given to the NIT as it was uploaded by the SDMC on a private website, www.tenderswizard.mcd.com and intimation of any tender uploaded on the said website is conveyed to over 2,000 registered contractors, learned counsel for the respondent/SDMC clarified that though the subject NIT had been notified on the official website of the SDMC, www.mcdonline.gov.in, it was not specifically uploaded on the *eAuctions* webpage. Instead, information regarding the NIT was given on the "News and Events" webpage of the official website, which gets automatically

replaced after every 10 days. As a result, the information relating to the subject NIT was displayed on the official website of the respondent/SDMC for a period of 10 days from 17.03.2020 and it got automatically deleted on 09.04.2020, whereas the last date for receiving the bids was 22.04.2020. In this background, it was submitted that there was insufficient dissemination of information in the public regarding the said tender and the response that was received, was from lesser number of bidders.

19. As for the Corrigendum uploaded on the *eAuctions* webpage on the website of the respondent/SDMC, alluded to by the other side to urge that the NIT did find mention there, Mr. Poddar, learned Senior Advocate again clarified that the main tender documents were uploaded on the "*News and Event*" webpage on the official website of the SDMC and on the portal of a private website, www.tenderswizard.mcd.com, but not on the *eAuctions* webpage thus, depriving interested parties of an opportunity to submit their bids and participate in the e-auction.

20. In their rejoinder arguments, both Mr. Chandhiok, learned Senior Advocate appearing for the petitioner in W.P.(C) 3811/2020 and Ms.Arora, learned counsel for the petitioner in W.P.(C) 4020/2020 stated that the *mala fides* on the part of the respondent/SDMC in issuing a fresh NIT is apparent from the fact that the Department has considerably diluted the terms and conditions only to ensure that those bidders, who were unable to submit their bids on the last occasion or could not meet the stipulated qualifications, manage to get an opportunity to participate this time. They referred to the order dated 12.05.2020 passed in **W.P.(C) No.3108/2020** entitled M/s.Paschatya Entertainment Pvt. Ltd. vs. SDMC and the order dated 18.05.2020 in **W.P.(C) No.3164/2020** entitled Lakhvinder Singh v. SDMC relating to the very same NIT and submitted that contrary to the stand now

sought to be taken by the respondent/SDMC that a cartel was created by the four bidders during the e-auction process, the SDMC had categorically stated before a co-ordinate Bench that there have been occasions when even one bidder has shown interest in respect of a particular parking site and ordinarily, the respondent/SDMC receives seven odd bids in response to such an NIT. Reference was also made to para 11 of the order passed in Lakhvinder Singh (supra), wherein counsel for the respondent/SDMC had stated before the court that the technical bid of the petitioner therein had to be rejected because he did not upload the correct documents. It was thus stated that many of the terms and conditions of the previous NIT, which formed the basis of disqualifying some of the bidders in respect of the subject tender, have been deliberately watered down by the respondent/SDMC in the fresh NIT to ensure that those bidders, who stood disqualified earlier, manage to gain an easy entry this time.

21. Learned counsel for the petitioners thus argued that there was no occasion to cancel the NIT dated 16.03.2020 and advertise a fresh NIT when it is not the case of the respondent/SDMC that they had received any representation from a third party stating that it was interested in applying but did not gain knowledge about the NIT and had thus, missed the bus. The conclusion of the Committee about any cartelization was hotly contested on the ground that it is not backed by any material and the burst of activity in the last half an hour on 13.05.2020, cannot be treated as unusual as it is in routine that bidders get activated only in the last one hour and participate in the online e-auction. The decisions cited by learned counsel for the respondent/SDMC were also sought to be distinguishable on facts.

22. We have given our careful consideration to the arguments advanced by learned counsel for the parties, perused the pleadings and examined the file of the Department, that was requisitioned by us.

23. It may be stated at the outset that in exercise of the powers of judicial review, the scope of interference by courts in administrative actions particularly relating to tender matters, is fairly narrow. It has been held in a catena of decisions of the Supreme Court and several High Courts that interference by the court would be warranted if the decision taken by the State is found to be so arbitrary, unreasonable and capricious that it cannot withstand judicial scrutiny or if the court arrives at the conclusion that the decision taken by the respondent/State is tainted on account of any *mala fides* in the transaction or with the idea of favouring a particular party or is otherwise perverse. In Tata Cellular Vs. Union of India, reported as (1994) 6 SCC 651, the Supreme Court has extensively discussed the scope of judicial review of administrative action in tender matters and observed thus:-

"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 favouritism. 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 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:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. 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) **Irrationality**, 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** [(1991) 1 AC 696], Lord Diplock refers specifically to one development, namely, the possible 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”.

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81. *Two other facets of irrationality may be mentioned.*

*(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in **Emma Hotels Ltd. v. Secretary of State for Environment** [(1980) 41 P & CR 255], the Secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional Court analysed the factors which led the Secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.*

*(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in **R. v. Barnet London Borough Council, ex p Johnson** [(1989) 88 LGR 73] the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down." (emphasis added)*

24. In Tejas Constructions and Infrastructure Pvt. Ltd. vs. Municipal Corporation Sendhwa and Anr., reported as **(2012) 6 SCC 464**, where the eligibility of the second respondent in the writ petition was challenged on the plea that he did not meet the requirements of the NIT for awarding the contract, the Supreme Court held as follows:-

*"17. In **Raunaq International Ltd. v. I.V.R. Construction Ltd.** [(1999) 1 SCC 492] this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide."*

25. In Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Anr., reported as (2016) 16 SCC 818, the Supreme Court had held as follows:-

“11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622, it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Port of Bombay, (1989) 3 SCC 293, it was held that the constitutional courts are concerned with the decision making process. Tata Cellular v. Union of India, (1994) 6 SCC 651 went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517 as mentioned in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622.

13. In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.” (emphasis added)

26. In West Bengal Central School Services Commission vs. Abdul Halim reported as (2019) 18 SCC 39, the Supreme Court was called upon to examine the scope of interference in an administrative action on the part of the High Court under Article 226 of the Constitution of India and it was held thus:-

“31. In exercise of its power of judicial review, the Court is to see whether the decision impugned is vitiated by an apparent error of law. The test to determine whether a decision is vitiated by error apparent on the face of the record is whether the error is self-evident on the face of the record or whether the error requires examination or argument to establish it. If an error has to be established by a process of reasoning, on points where there may reasonably be two opinions, it cannot be said to be an error on the face of the record, as held by this Court in Satyanarayan Laxminarayan Hegde v. Millikarjun Bhavanappa Tirumale, AIR 1960 SC 137. If the provision of a statutory rule is reasonably capable of two or more constructions and one construction has been adopted, the decision would not be open to interference by the writ court. It is only an obvious misinterpretation of a relevant statutory provision, or ignorance or disregard thereof, or a decision founded on reasons which are clearly wrong in law, which can be corrected by the writ court by issuance of writ of certiorari.

32. The sweep of power under Article 226 may be wide enough to quash unreasonable orders. If a decision is so arbitrary and capricious that no reasonable person could have ever arrived at it, the same is liable to be struck down by a writ court. If the decision cannot rationally be supported by the materials on record, the same may be regarded as perverse.

33. However, the power of the Court to examine the reasonableness of an order of the authorities does not enable the Court to look into the sufficiency of the grounds in support of a decision to examine the merits of the decision, sitting as if in appeal over the decision. The test is not what the Court considers reasonable or unreasonable but a decision which the Court thinks that no reasonable person could have taken,

which has led to manifest injustice. The writ court does not interfere, because a decision is not perfect." (emphasis added)

27. In Municipal Council, Neemuch Vs. Mahadeo Real Estate & Ors., reported as (2019) 10 SCC 738, following the law laid down in Tata Cellular (supra) and West Bengal Central School Services Commission (supra), the Supreme Court made the following the pertinent observations:-

"14. It could thus be seen that the scope of judicial review of an administrative action is very limited. Unless the Court comes to a conclusion that the decision-maker has not understood the law correctly that regulates his decision-making power or when it is found that the decision of the decision-maker is vitiated by irrationality and that too on the principle of "Wednesbury unreasonableness" or unless it is found that there has been a procedural impropriety in the decision-making process, it would not be permissible for the High Court to interfere in the decision-making process. It is also equally well settled that it is not permissible for the Court to examine the validity of the decision but this Court can examine only the correctness of the decision-making process.

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16. It could thus be seen that an interference by the High Court would be warranted only when the decision impugned is vitiated by an apparent error of law i.e. when the error is apparent on the face of the record and is self-evident. The High Court would be empowered to exercise the powers when it finds that the decision impugned is so arbitrary and capricious that no reasonable person would have ever arrived at. It has been reiterated that the test is not what the Court considers reasonable or unreasonable but a decision which the Court thinks that no reasonable person could have taken. Not only this but such a decision must have led to manifest injustice." (emphasis added)

28. A glance at the above decisions shows that in exercise of the jurisdiction vested in the court under Article 226 of the Constitution of India, the scope of judicial review in respect of administrative actions taken by the State, is quite limited. In matters of tender, the court is primarily concerned with the method adopted by the State for disposal of public property and it can examine whether the same has been fair and transparent and sufficient opportunity has been provided to all the stake holders to participate in the tender process. It is the decision making process that the court is expected to examine and not the ultimate decision arrived at by the State. Courts can however interfere if the tender process adopted or the decision taken by the respondent/authority is found to be arbitrary, irrational, unreasonable or *mala fide*.

29. Coming back to the instant case, there is no dispute on facts. It is not in dispute that the petitioners were found to be the H1 bidders in respect of two multilevel parking sites each, subject matter of the NIT dated 16.3.2020, advertised by the respondent/SDMC. It is also not in dispute that Offer letters dated 15.5.2020 were communicated to the petitioners declaring them as H1 bidders in respect of the subject multilevel parking sites and in response thereto, they had fulfilled all the requisite formalities mentioned in the Offer letters, within the stipulated time. However, before the formal Letters of Allotment could be issued and the parking sites handed over, the impugned communications dated 19.6.2020 were issued by the respondent/SDMC informing the petitioners that the Competent Authority had decided to recall the entire e-auction tendering process in respect of the NIT dated 16.3.2020.

30. We have perused the file of the department that was requisitioned to examine the reasons that have weighed with the respondent/SDMC for

deciding to scrap the entire tender process. The records reveal that a letter dated 28.5.2020 was issued by the Chairman, Standing Committee, SDMC, complaining about the manner in which the subject tender had been processed. This was followed by a letter dated 10.6.2020, jointly signed by five members of the Standing Committee, SDMC addressed to the Commissioner, SDMC, requesting him to examine a complaint received by them from a private party and enclosed with the said letter, regarding mishandling of the tender process. On receiving the letters dated 28.5.2020 and 10.6.2020, the Commissioner, SDMC decided to constitute a nine-member Committee, headed by the Additional Commissioner, SDMC to go into the complaints and submit its report in respect of the multilevel parking tender process.

31. The said Committee deliberated over the entire issue, examined the facts stated in the complaints and after going through the records relating to the tender process, submitted a report. Since the decision of the respondent/SDMC to withdraw the NIT is based on the recommendations of the Committee, the said Report is extracted hereinbelow for ready reference:-

".....Detailed examination of record made available to the Committee and deliberation on issues related to the tender has brought out following:

1. Contents of complaint and the allegations levelled in the said complaint are general in nature yet keeping in view totality of the facts and circumstances and so as to arrive at rightful conclusion, it was necessary to look into the entire e-tender process adopted in the instant case.

2. The e-tender notice was published on 17.03.2020, in the newspaper by the office of R.P. Cell through P&I department (Annex-A). As per this notice, the bid was invited from multilevel car parking for a period of 3 years (extendable up to 2 years). Further it was mandatorily required by the bidder to furnish the entire documents after signing each page and submitting the same online. The said notice also stipulated that

all relevant tender documents which are to be downloaded for bid participation are available on the website: www.mcdonline.gov.in or www.tenderwizard.mcd.com/southdmc.

3. On further scrutiny of the e-tender process, report from IT department of SDMC, placed at Annexure-B, it was found that the main tender document was never sent to IT department by RP Cell for uploading and so it was never uploaded on www.mcdonline.gov.in. Thus, the same was not available to the prospective bidders.

4. It is worth mentioning that only the working contractor of the department or the contractor registered on tender wizard site would be aware of the tender notice. New persons/firms desirable of participating in the tender, perhaps, evidently, would not be aware of the tender. Thus, there is no doubt that that equal opportunity was not made available to all, resulting only 7 participants availed the opportunity to participate for six parking sites. Thus, it goes to show that there was no wider participation for healthy competition.

5. The e-tender notice was published in the newspapers on TOI, Amar Ujala etc. This notice stipulates tender period for 3 years (extendable up to 2 years). On the other hand the approved tender document available for prospective bidders offered the contract period for 5 years without indicating the break up period as mentioned in the newspaper. This error may have created confusion in the mind of the prospective bidders regarding the actual contract period and its revenue potential. Further, this error was never clarified at any stage of the tender process.

6. The prospective bidders were also asked to furnish and upload all documents after stamping and signing it physically. Under e-tender process this condition is not required, as the authenticity of the documents is established and taken up through digital signature.

7. The tender documents mentioned date of pre bid meeting. However, record does not reflect holding any pre-bid meeting in this behalf. It is an important event in any tender to understand the problems of the prospective bidders, clarify their doubts and to take corrective steps. However, no pre-bid meeting was held. So departments could not get the insight of the prospective bidders. The report of not having a pre-bid meeting was also not submitted to the competent authority.

8. Tenders for surface parkings do not have the clause of “2 years of experiences in parking domain” therefore it is not desirable to have this clause in future tenders.

9. Because of certain conditions in the tender document like

a) Uploading of signed and stamped in the tender document.

b) Notarisation of affidavits.

c) No dues certificate from AC/RP Cell.

have led to cancellation of few bids. Therefore, it is not compatible to have above clauses in future e-tenders. Instead of no dues certificate from AC/RP Cell prospective bidders shall submit an undertaking that “there is no outstanding dues against them in SDMC”.

10. Reports regarding transaction during the auction period for each of the multi level parking sites (Annexure – C, 12 pages), which took place on 13.05.2020 has been downloaded from e-auction portal, which indicates that the window for the auction was opened from 11 am to 5.35 pm, but the actual auction activity started at around 5.17 pm and concluded at staggered manner up to 5.38 pm. This reveals that the actual auction activity occurred for merely around 15-20 minutes and all the three successful bidders won two sites each. This short burst of auction activity does not rule out the possibility of cartel formation, jeopardizing the basic spirit of e-auction process. Based on this experience, the Committee thus recommends for e-tender procedure for future biddings of parking sites instead of e-auction.

11. Considering the above facts and circumstances, the Committee is of the view that there was lack of active and healthy participation in the present bid. Committee is also of the view that there is possibility of cartel formation among three successful bidders. Thus, the Committee after detailed deliberation recommends that in terms of provisions contained in clause 12 of the tender document, the offer/permission granted to all the Multi level parking sites offered to three successful bidders may be withdrawn. The Performance Security and advanced MLF so taken may be returned to the bidders.

12. The Committee further recommends for annulment of the instant tender process and recall of tender after revising the tender conditions for getting wider participation and healthy competition in larger public interest.

13. Further on tender file and record, reveals that the department had fixed the MLF on lump sum basis as no base was available with the department. However, after the receipt of the offer to the department, base rate for the different sites may be considered accordingly. Thus, the Committee also recommends that following new reserve price for fresh tender may be considered.

S.No.	Name of multi level parking site	Recommended MLF
1.	Hauz Khas	Rs. 1,25,000/-
2.	Munirka	Rs. 1,15,000/-
3.	Kalkaji	Rs. 3,05,000/-
4.	Rajouri Garden	Rs. 1,20,000/-
5.	Subash Nagar	Rs. 1,30,000/-
6.	New Friends Colony	Rs. 1,30,000/-

The above recommendations may be placed before competent authority for consideration." (emphasis added)

32. On receiving and examining the aforesaid recommendations made by the Committee, the Commissioner, SDMC took a decision to scrap the entire tender process and called for a fresh tender. Vide letter dated 19.6.2020, the petitioners were informed that the entire e-auction tendering process had been recalled and the bidding process stood cancelled. Resultantly, the Offer letters dated 15.5.2020 were also withdrawn and the advance monthly license fees and security deposit deposited by the petitioners were returned to them.

33. The contention of the learned counsel for the petitioners that the communication dated 19.6.2020, issued by the respondent/SDMC is a non-speaking order and not sustainable in view of the decisions in Mohinder Singh Gill (supra) and Reebok India Ltd. (supra) and that the explanation now sought to be offered by the respondent/SDMC in its counter affidavit, cannot be read into the cancellation letters to make good the default, is unmerited. The communication dated 19.6.2020 cannot be treated as a judicial order passed by the respondent/SDMC on the administrative side. It is only an intimation to the petitioners of the decision taken by the respondent/SDMC to recall the e-auction tendering process and withdraw the Offer letters dated 15.5.2020.

34. In the above context, we may usefully refer to the decision of a Division Bench of this court in Ghanshyam Das Aggarwal (supra) authored by His Lordship, Justice R.C. Lahoti, as he then was, wherein, the court was called upon to examine the action of the respondent/DDA of refusing to accept the bids of the highest bidders in respect of industrial plots put on a public auction. Relying on the decision in **CWP No.250/1995** entitled Dr. Bosechandani & Ors. Vs. DDA, Kumari Shrilekha Vidyarthi & Anr. Vs. State of U.P., reported as **AIR 1991 SC 37** and Kusum Lata Khajanchi & Ors. Vs. DDA & Ors., reported as **1995 (35) DRJ 480**, the court rejected the

plea of the petitioner therein that there were any *mala fides* involved or that he had been singled out for being excluded for allotment on the ground of hostile discrimination. It was held that the terms and conditions of the public auction did not contemplate that reasons for rejecting the highest bid be communicated to the concerned bidders and in the absence of any rule or terms and conditions in the tender document, reasons need not be assigned in the sense of being communication to a party. We may usefully extract below, para 15 of the captioned decision:-

*"15. The observation made by the Supreme Court is binding on us, but we do not think it is going to make any difference in the case at hand. Firstly, the Rules and the Terms and Conditions of the Public Auction did not contemplate reasons for rejection of highest bid being communicated to the concerned bidders. There is a distinction between existence of reasons and assigning of reasons (see **Shrilekha Vidyarthi AIR 1991 SC 537 Pr. 13** and **Liberty Oil Mills AIR 1984 SC 1271**) The former is a requirement of natural justice, the latter is a dictate of law. **Reasons need not be assigned in the sense of being communicated to a party unless required to be so done by any Rule having force of law. Secondly, the reasons could have been made available if asked for. Thirdly, the reasons for rejection though not communicated and though not asked for by the petitioners before filing the petitions have been made available in the Court in response to the show cause notice issued and it would serve no useful purpose if we may dispose of the petitions merely by directing the respondents-DDA to communicate the reasons to the petitioner. The reasons now having been made known to the petitioners, they have been heard thereon. Whatever they had to say on such reasons they have said and we have also tested the validity of the reasons and have found nothing unreasonable therewith. That is an end of the matter.**" (emphasis added)*

35. Again, in a recent decision in Silppi Constructions Contractors vs. UOI and Anr. reported as **2019 SCC OnLine SC 1133**, where the Supreme

Court was seized of a tender matter, on the aspect of not furnishing of reasons for rejecting the technical bids of the petitioner therein, it was observed as follows:-

"25. That brings us to the most contentious issue as to whether the learned single judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a state within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. The Respondent nos. 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done." (emphasis added)

36. Even in the instant case, no rule or terms and conditions in the tender documents have been pointed that casts an obligation on the respondent/SDMC to furnish reasons for recalling the entire e-auction tendering process, nor have the petitioners approached the respondent/SDMC seeking any reasons for rejection of their bids. Instead, they have filed the present petitions with a grievance against the communication dated 19.6.2020. The reasons for recalling the NIT have been elaborated in the counter affidavit of the respondent/SDMC and a copy of the Report of the Committee, constituted by the Commissioner, SDMC has also been placed on record (Annexure R/3). Once the reasons for cancelling the tender process have been brought to light and we have considered the arguments advanced on behalf of the petitioners, questioning the validity of the said reasons, the grievance of the petitioners in this regard does not survive. It is

now for this court to examine the reasons that persuaded the respondent/SDMC to scrap the tender.

37. We thus proceed to examine the validity of the reasons that have propelled the respondent/SDMC to recall the entire tender process. On distilling the report of the Committee, following were the prominent reasons offered for recommending annulment of the tender process and revision of the terms and conditions of the new NIT that have found favour with the Commissioner, SDMC:-

- a. While the approved tender document stated that the contract was for a period five years without mentioning any breakup of the period, the NIT advertised in the newspapers, mentioned that the tender was to be awarded for a period for three years, extendable up to two years. This would have created confusion in the mind of the prospective bidders regarding the actual contract period and its potential of revenue generation.
- b. Though the tender documents mentioned a date for conducting the pre-bid meeting, no pre-meeting had taken place which would have afforded an opportunity to the Department to get an insight into the problems of the prospective bidders, clarify any doubts and take remedial steps.
- c. The short burst of the online auction activity at the fag end of 13.05.2020, between 05:17 pm to 05:38 pm indicated a serious possibility of cartel formation by the bidders which was detrimental to the e-auction process. The Committee concluded that this showed that there was a lack of healthy participation in the bidding process.

38. Besides the aforesaid observations, the Committee also recommended that on the next occasion, certain conditions forming a part of the cancelled tender documents, be appropriately modified/alterd. To prevent bidders from forming a cartel and depressing their bids thereby causing loss of revenue to the Department, it was suggested that instead of adopting the e-auction process for future bidding of parking sites, the e-tender procedure be adopted. It was suggested that conditions relating to uploading of signed and stamped tender documents, notarisation of affidavits and obtaining No Due Certificates from the AC/RP cell be done away with and instead, the prospective bidders may submit an undertaking to the effect that there were no outstanding dues against them in the SDMC. Another recommendation made was to dispense with the requirement of furnishing and uploading of all documents after stamping and signing them physically, as under the e-tender process, the said condition would become irrelevant for the reason that once a digital signature is endorsed on the document, its authenticity is automatically established. Learned counsel for the respondent/SDMC has submitted that all the aforesaid recommendations made by the Committee have been accepted by the department and incorporated in the fresh NIT.

39. We do not find any force in the objection taken by learned counsel for the petitioners that the amendments made in the fresh NIT are only to accommodate those bidders who had participated in the previous NIT, but were disqualified on account of technical reasons. The Committee constituted to examine the tendering process has made some pithy observations in relation to the anomalies and errors that had crept in the earlier tender documents and the bidding process adopted and have sought to rectify them by shifting from the e-auction mode to the e-tender procedure, dispensing with extraneous documents and the requirement of signing and

stamping of documents under the e-tender process with the sole object of streamlining the process, ensuring wider participation, healthy competition in the bidding process and for maximizing revenue generation from the public properties. In fact, the Committee's recommendations of enhancing the reserve price for all the six multilevel parking sites in the fresh tender have also been readily accepted by the respondent/SDMC with the idea of generating more revenue through public auction. Once a level playing field has been offered to all the bidders including the petitioners herein to participate in the tender process, there can be no grievance against the terms of the tender documents.

40. One must not lose sight of the fact that this the first time that the respondent/SDMC has decided to award contracts in favour of private parties for operating the multilevel parking sites owned by it. Earlier hereto, the parking sites were being operated by the SDMC through a Government agency, namely, DIMTS. Therefore, there was no past experience to fall back on for working out the terms of such a tender and the process for tendering multilevel parking sites. In these circumstances, the scope of *bonafide* errors and oversight cannot be ruled out. Moreover, on examining the manner in which the bidding took place on the day of the auction i.e., on 13.6.2020, it is revealed that though the window for participating the e-auction was open from 11 AM to 5.30 PM, the actual activity by all the four bidders had commenced only at the fag-end of the day, at around 5.17 PM and had lasted for 15-20 minutes. At the end of the day, each of the three successful bidders including the two petitioners herein, were able to bag two parking sites without any conflict of interest. The Committee smelt a rat and opined that the possibility of cartelization in the entire bidding process could not be ruled out and thus recommended cancellation of the tender as also a

change in the mode of the future bidding process by moving over from the e-auction platform to the e-tender procedure. We do not see any unreasonableness, arbitrariness or perversity in the aforesaid decision making process for this court to interfere more so, when the entire objective of the respondent/SDMC appears to be directed towards ensuring wider participation and generating more revenue from a public property.

41. As for the submission made by learned counsel for the petitioners that there was nothing out of place in the tender process and the respondent/SDMC had itself stated before a coordinate Bench in two proceedings arising from the very same NIT that ordinarily, 7 bids are received for parking sites and even if one bid is found good enough, the same could be accepted, we may fruitfully refer to a decision in Meerut Development Authority Vs. Association of Management Studies reported as (2009) 6 SCC 171 wherein, the Supreme Court was dealing with the aspect of disposal of public property by an instrumentality of the State and held thus:-

"26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a

transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism." (emphasis added)

42. In the present case too, the petitioners cannot insist that since they were declared as H1 bidders, a vested right had accrued in their favour and the respondent/SDMC had no option but to issue Allotment Letters and hand over possession of the parking sites in question in their favour. The respondent/SDMC was well within its right to pause and re-examine the entire tender process, which it did on receiving complaints from some quarters. The Committee constituted by the Commissioner, SDMC has looked into the matter in depth and recommended the tender to be withdrawn for plausible reasons. The court cannot delve into the sufficiency of the reasons that prevailed with the respondent/SDMC for taking such a step. The material placed on records justifies the rationality of the decision taken by the respondent/SDMC to scrap the tender process.

43. Another argument advanced by learned counsel for the petitioners was that once the petitioners had complied with all the terms and conditions stipulated in the Offer letters dated 15.5.2020 issued by the respondent/SDMC, the contract between the parties stood concluded and issuance of the allotment letters in terms of Clause 12 of the tender documents and handing over possession of parking sites in question were mere formalities, which submission learned counsel for the respondent/SDMC has vehemently disputed and cited the very same Clause 12 to urge that it clearly stipulates that a formal allotment letter will be issued to the H1 parking contractor and in the instant case, admittedly, no such letters were issued to the petitioners and nor was the physical possession of the parking sites handed over to them. Instead, the entire tender process was cancelled.

44. On the aspect as to whether the contract between the parties stood concluded or not, we may profitably refer to the observations made by the Supreme Court in Rishi Kiran Logistics Pvt. Ltd. (supra). In the said case, taking note of an earlier decision in Kisan Sahkari Chini Mills Ltd. Vs. Vardan Linkers & Ors., reported as **(2008) 12 SCC 500**, the Supreme Court held that enforcement of a contract entered into between the parties would fall in the realm of 'law of contract' and cannot be made the subject matter of adjudication in a petition filed under Article 226 of Constitution of India and observed as below:-

*"37. The questions before the Supreme Court in **Kisan Sahkari Chini Mills Ltd. case [(2008) 12 SCC 500]** were: (i) Whether the High Court was right in concluding/assuming that there was a valid contract? and (ii) Whether the High Court was justified in quashing the order of the Secretary (Sugar)? This Court answered the aforesaid questions in the negative and set aside the judgment of the High Court holding that:*

“Ordinarily, the remedy available for a party complaining of breach of contract lies for seeking damages. He would be entitled to the relief of specific performance, if the contract was capable of being specifically enforced in law. The remedies for a breach of contract being purely in the realm of contract are dealt with by civil courts. The public law remedy, by way of a writ petition under Article 226 of the Constitution, is not available to seek damages for breach of contract or specific performance of contract. However, where the contractual dispute has a public law element, the power of judicial review under Article 226 may be invoked.”

It is clear that the aforesaid case is closest to the facts of the present case.

38. It thus stands crystallised that by way of writ petition under Article 226 of the Constitution, only public law remedy can be invoked. As far as contractual dispute is concerned that is outside the power of judicial review under Article 226 with the sole exception in those cases where such a contractual dispute has a public law element.

XXX XXX XXX

40. Insofar as the issue regarding concluded contract in the present case is concerned, this falls squarely in the realm of the contract law, without any hue or shade of any public law. In fact, that is not even pleaded or argued. At the same time, whether there was a concluded contract or not is seriously disputed by the respondents and, therefore, in the first instance it was not even necessary for the High Court to go into this issue and could have relegated the appellant to ordinary civil remedy. We are conscious of the position that merely because one of the authorities raises a dispute in regard to the facts, it may not be always necessary to relegate the parties to a suit. This was so stated in ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd. [(2004) 3 SCC 553] in the following manner:

“37. In our opinion, this limited area of dispute can be settled by looking into the terms of the contract of insurance as well as the export contract, and the same does not require consideration of any oral evidence or

any other documentary evidence other than what is already on record. The claim of the contesting parties will stand or fall on the terms of the contracts, interpretation of which, as stated above, does not require any external aid."

41. At the same time, as already noted in Kisan Sahkari [(2008) 12 SCC 500] this Court had taken a view that where the question whether there was a contract or not is seriously disputed, the court is not to assume that there was a valid contract and on that basis examine the validity of the administrative action. Therefore, keeping in view the aforesaid understanding of the law, a very limited inquiry on this aspect is permissible." (emphasis added)

45. Again, in an earlier decision in Jagdish Mandal v. State of Orissa reported as (2007) 14 SCC 517, the Supreme Court has emphasized that the power of judicial review ought not be invoked to extend protection to private interest at the cost of public interest in the following words:-

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts

by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.....” (emphasis added)

46. Taking a cue from the aforesaid decisions, we do not propose to examine as to whether the contract between the parties before us was complete in all respects or not and nor are we inclined to split hair over the interpretation of Clauses 10 and 12 of the tender documents. If the petitioners have a grievance in this regard, they are at liberty to seek damages against the respondent/SDMC in appropriate civil proceedings. However, that will not be a ground for this court to interfere. As long as there are adequate checks and balances incorporated in the tender document to ensure fairness in the procedure, courts are loath to interfere. At the end of the day, we must leave it to the respondent/SDMC to determine its own requirements and evaluate the financial viability of the NIT. For that, it must be allowed a free play in the joints to entrust the contract to the highest bidder on the terms and conditions found to be viable.

47. To conclude, on examining the decision making process adopted by the respondent/SDMC for recalling the earlier NIT and advertising a fresh NIT, we do not find any infirmity therein; nor do we propose to examine with a tooth comb, the fresh terms incorporated in the NIT subsequently advertised by the respondent/SDMC. Evaluating the terms and conditions of the tender and awarding the contract are purely commercial functions left best to the wisdom of the respondent/SDMC. We are satisfied that the

respondent/ SDMC has recalled the previous tender for just and valid reasons. A scrutiny of the records bears out the submission made on behalf of the respondent/SDMC that the decision taken in this regard is not tainted with arbitrariness, perversity, irrationality, *malafides* or any bias. Merely because the petitioners claim that they would suffer financial losses on account of losing the tender, is not sufficient ground for this court to exercise powers of judicial review in their favour.

48. In view of the aforesaid discussion, both the petitions are dismissed as meritless alongwith the pending applications with no orders as to costs.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

JULY 21, 2020

rkb/sk/ap/a