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

Date of decision: 04th MAY, 2023

IN THE MATTER OF:

+ **W.P.(C) 5454/2023 and C.M. APPL. 21332/2023 & 21333/2023**

JAGTAR SINGH

..... Petitioner

Through: Mr. Akhil Sibal, Sr. Advocate with
Mr. Arun Batta, Ms. Indira Marla,
Mr. Rohan Sharma and Mr. Abdul
Vahid, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI

..... Respondent

Through: Mr. Sanjay Poddar, Sr. Advocate with
Mr. Tushar Sannu, SC, Mr. Govind
Kumar, Mr. Azad Bansala, Mr.
Sachin Bhatt, Advocates with Mr.
Vijay Ahlawat, JE, MCD.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT(ORAL)

1. *Vide* the present Writ Petition the Petitioner seeks to challenge the e-Tender, being No. AC/RPC/MCD/2023/D-230, dated 17.04.2023, issued by the Respondent herein for allotment of authorized parking sites falling under the jurisdiction of NDMC, including the truck parking site at Timarpur (*hereinafter referred to as 'the site in question'*). The Petitioner also seeks for a writ of mandamus directing the Respondent herein to open the technical and financial bid of corrigendum dated 11.04.2022 being DC/RP CELL/NDMC/2022/D-44 with respect to the very same parking site. The Petitioner also seeks for an order restraining the Respondent herein from

opening the technical bids of the site in question on 03.05.2023.

2. The facts of the case reveal that on 09.10.2020 the Respondent/Corporation floated a tender, being No. ADC/RPC/NDMC/2020/D-197, for allotment of various parking sites which also included the site in question, admeasuring 42667.85 SqM with parking capacity of 38215.62 SqM for parking of 125 trucks and 25 four wheelers. It is stated that the Petitioner was interested in placing his bid for the site in question but was unable to do so because of some technical glitch in the website of the Respondent/Corporation. It is stated that, thereafter, the Petitioner herein approached this Court by filing W.P. (C) 10170/2020 seeking an order restraining the Respondent herein from proceeding ahead with opening of financial bids in respect of the parking site in question. On 15.12.2020, this Court passed an interim order in favour of the Petitioner herein by staying the opening of financial bid in respect of the parking site in question. *Vide* Order dated 02.08.2021 the aforementioned Writ Petition was disposed of. It is stated that the said Order was challenged by the Petitioner in the Apex Court by filing a Special Leave Petition, being SLP(C) No.12652/2021. The said SLP has been dismissed by the Apex Court *vide* order dated 23.08.2021.

3. It is stated that in September 2021, Respondent herein awarded the tender of the site in question to one Sanjay Yadav. Material on record discloses that Sanjay Yadav had disputes with the Respondent herein primarily on the ground that the area that was handed-over to him was less than the area for which he placed his bid as the said area is under the Delhi Development Authority (*hereinafter referred to as 'the DDA'*), which is the land owning agency and a much lesser area was handed over to the Respondent. It is stated that only an area of 5005 SqM was handed over.

4. It is stated that the Respondent herein *vide* corrigendum dated 11.04.2022, bearing No. DC/RP CELL/NDMC/2022/D-44, invited fresh bids for the site in question by reducing its area to 5005 SqM with parking capacity of 57 Trucks only. It is stated that the Petitioner herein placed his bid for this tender (*hereinafter referred to as 'the corrigendum tender'*).

5. It is stated that Sanjay Yadav, who was already operating the site in question, approached this Court by filing W.P(C) No. 6323/2022 which was dismissed by Order dated 29.04.2022 on the ground that the Petitioner therein was trying to enforce the contract which could not be done in writ proceedings. Thereafter, an appeal, being LPA No.294/2022 was filed by Sanjay Yadav against the order dated 29.04.2022.

6. It is stated that though there was no stay, the Respondent herein did not open the bids for the corrigendum tender despite multiple requests of the Petitioner herein. It is stated that on 17.03.2023, the Petitioner herein moved an application for impleading himself as a party in LPA No.294/2022. The said LPA was finally heard and Orders were reserved on 21.03.2023.

7. It is stated that despite this Court reserving Orders in LPA No.294/2022, the Corporation floated fresh tender being No. AC/RPC/MCD/2023/D-230, dated 17.04.2023, (*hereinafter referred to as 'tender in question'*) and the parking sites on offer included the site in question with total area of 43220 SqM having parking area of 17,227 SqM for 184 six wheelers and 58 four wheelers. It is this tender has been challenged by the Petitioner on the ground that the first tender which was floated on 09.10.2020 covered an area of 42667.85 SqM with parking capacity of 38215.62 SqM for parking of 125 trucks and 25 four wheelers, however, in corrigendum dated 11.04.2022, bearing No. DC/RP CELL/NDMC/2022/D-44, through which fresh bids were invited for the site

in question, the total area of the site in question was 5005 SqM with parking capacity of 57 Trucks only and in the tender in question the area has again been increased to parking area of 17,227 SqM for 184 six wheelers and 58 four wheelers. It is pertinent to mention here that the Petitioner has not participated in this tender.

8. It is stated that the DDA has yet not granted any approval for releasing the area of the site in question and it has given its NoC to the Corporation only for an area of 5005 SqM. It is contended that the tender in question will again be declared as null and void as the Corporation has yet not been able to obtain an NoC from the land owning agency, i.e. DDA.

9. It is pertinent to mention that LPA No.294/2022 was dismissed *vide* Order dated 01.05.2023.

10. Mr. Akhil Sibal, learned Senior Counsel and Mr. Arun Batta, learned Counsel appearing for the Petitioner, submit that the Respondent/Corporation ought to have opened the bids of corrigendum tender dated 11.04.2022 and ought to have awarded the contract. He states that the Corporation could not have floated a new tender for the site in question without obtaining an NoC from the DDA for the area which they have notified to offer under the new tender. He places reliance on the judgment passed by a Division Bench of this Court in Braham Construction Company v. East Delhi Municipal Corporation, 2020 SCC OnLine Del 1518, to contend that without getting an NOC from the land owning agency the tender in question could not have been issued.

11. *Per contra*, Mr. Sanjay Poddar, learned Senior Counsel appearing for the Corporation, submits that bids for corrigendum tender dated 11.04.2022 were not opened and it was cancelled because of the appeal that was preferred by Mr. Sanjay Yadav. He further submits that the officials of the

Corporation have met the Vice Chairman of DDA on 17.04.2023 wherein the DDA has agreed to allot parking area of 17,227 SqM to the Corporation. He further submits that in view of the above, the NoC is now a mere formality.

12. Heard the counsels for the parties and perused the material on record.

13. This Court has perused the file notings regarding cancellation of tender and allotment of parking area of 17,227 SqM by DDA to the Corporation and the same reads as under:

“In pursuance to the approval to cancel the existing contract at Timarpur Truck Parking site and tender it: I visited DDA today and met Vice Chairman. DDA to share the details of parking area proposed to be tendered for the said site. accordingly. shared the new Auto CAD map so prepared and sought his intervention to allot a parking area of 17.227 sq m as per the drawings. I informed the VC, DDA that the Department will be moving ahead with tendering of the Timarpur Truck Parking site as per the Auto CAD map which has a provision of ECS of 184 6W and 58 4W today itself.

2. The Vice Chairman, DDA agreed to allot a parking area of 17,227 sq m at Timarpur Parking site as sought by the Department. He asked that a letter in this regard may be sent. He also inquired that why the MCD is not seeking allotment of 38.000 sq m area as sought earlier. I informed him that the proposed parking area of 17,227 sq m is the maximum area that can be earmarked for parking purpose out of the existing 38.000 sq m of vacant space as per Delhi Maintenance and Management of Parking Places Rules, 2019. Master Plan and IRC:SP 12:2015. Any area for parking purpose in excess to the proposed parking area of 17, 227 sq m will be legally untenable. The VC, DDA was convinced of the legal aspect involved in earmarking the parking area out of given land parcel.

3. However, OSD to VC, DDA proposed that a joint survey of the parking site may be undertaken before allotment of the parking area. I stated that joint survey may be undertaken immediately if it is at all necessary since the drawings already has taken into account all the available space for parking facility at the site. I also emphasised that in view of the urgency to tender the cancelled parking site, the Department will proceed with floating the tender today itself for a parking area of 17,227 sq m (ECS 184 6W and 58 4W). In case of any compelling reason for modification in the parking area/ECS, a corrigendum can be issued.

4. In view of the fact that VC, DDA has asked for a letter, a draft has been prepared for kind approval. A copy of the new Auto CAD map is also enclosed.

5. It is also stated that this parking site was earlier tendered on 06.04.2022 for allotment of a parking on an area of area of 5005 sq m and the financial bid received could not be opened due to a stay imposed by Hon'ble High Court in the matter. Now since the Department is proceeding with a fresh tender for a bigger parking area, the previous tender may be cancelled and the EMDS of the bidder may be returned.”

14. A perusal of the notings indicate that the DDA has agreed to allot the area of 17,227 SqM to the Corporation and the grant of NoC is, therefore, just a formality.

15. Further, this Court is of the opinion that the fact that an LPA was pending in the Court was a sufficient ground to cancel the corrigendum tender dated 11.04.2022 and this Court does not find any reason to interfere with the same.

16. It is well settled that a mere notice inviting tender does not create any

right on the parties and for valid reasons it is always open for the authority issuing tender to modify or cancel the tender before opening the bids.

17. The scope of interference under Article 226 of the Constitution of India in matters of tender is well settled. The Apex Court in Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216, after relying on various judgments has observed as under:-

“23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the 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 the 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; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

18. The Apex Court in a number of judgments has crystallized the test to be taken into account by the Courts before interfering in tender matters which reads as under:-

“A court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) *Whether public interest is affected.*

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

[Refer: Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; Ranaq International Ltd. v. I.V.R. Construction Ltd. & Ors., (1999) 1 SCC 492 etc.]

19. In view of the above, it is well settled that the scope of interference by the High Court while exercising its jurisdiction under Article 226 of the Constitution of India is extremely narrow. This Court is primarily concerned only with the method adopted to see if the method adopted by the State is fair and transparent and the same is not arbitrary, intended to favor someone, or irrational. In case the decision-making process is just, fair and reasonable, the writ courts must loathe to interfere with the award of contracts by the State/Instrumentalities of the State.

20. The Apex Court in Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr., (2016) 16 SCC 818, has observed as under:-

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] 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* [*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* [*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* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] as mentioned in *Central Coalfields* [*Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] .

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 supplied)

21. In Silppi Constructions Contractors vs. Union of India and Anr., (2020) 16 SCC 489, the Apex Court has observed as under:-

*"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. **The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small***

mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case." (emphasis supplied)

22. The Corporation was well within its right to withdraw the corrigendum dated 11.04.2022 because an appeal pertaining to the same was pending before this Court.

23. It is also pertinent to note that the matter came up for hearing on 28.04.2023 and it was adjourned to 01.05.2023. It was always open to the Petitioner to participate in the tender in question, last date of which was 02.05.2023. The Petitioner has decided not to participate in the tender. It is,

therefore, now not open to the Petitioner to challenge the tender process. This Court has also gone through the file notings which indicate that an agreement has been reached by which the DDA has agreed to allot a parking area of 17,227 Sq. meters that can be earmarked for parking purpose. The tender is being issued for a parking area of 17,227 Sq. meters (ECS 184 6W and 58 4W). The reason for withdrawing the corrigendum is that the LPA was pending and this cannot be found fault with. This Court, therefore, does not find that the entire exercise has been carried out only to favour any person rather public interest be served after a larger area is offered for the purpose of tender.

24. In view of the above, we find no merit in the Writ Petition and the same is dismissed, along with the pending applications, if any.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

MAY 04, 2023

Rahul