

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

Judgment reserved on: 21.03.2023

% **Judgment delivered on: 01.05.2023**

+ **LPA 294/2022 & C.M. Nos. 21339-21342/2022, 1223/2023, 13304-13305/2023 & 13540/2023**

SANJAY YADAV

..... Appellant

Through: Mr. Ajay Verma, Sr. Advocate with
Mr. Ishaan Verma and Mr. Amitesh
Gaurav, Advocates.

versus

NORTH DELHI MUNICIPAL CORPORATION Respondent

Through: Mr. Sanjay Poddar, Sr. Advocate with
Mr. Manu Chaturvedi, Ms. Aakriti
Singh, Mr. Govind Kumar, Mr. Sachin
Bhatt and Mr. Pratish Goel,
Advocates for Respondent/ MCD.
Mr. Arun Bhatta, Ms. Indira Marla,
Ms. Ranjna Ahuja and Mr. Abdul
Vahid, Advocates in C.M. Nos.
13304-13305.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. The instant Letters Patent Appeal has been preferred by the Appellant herein challenging the Judgment dated 29.04.2022 (“Impugned

Judgment”) passed by the Learned Single Judge in W.P.(C) No. 6454/2022, wherein the Ld. Single Judge has dismissed the Writ Petition preferred by the Appellant/Petitioner.

2. Shorn of details, the facts necessary for the adjudication of the instant appeal are as under:

a. The North Delhi Municipal Corporation (*hereinafter referred to as “Respondent” or “Respondent Corporation”*) on 09.10.2020 issued a Notice Inviting Tender (NIT) bearing NIT No. 197, calling for tenders to allot the Truck Parking Site at Timarpur, New Delhi on a monthly license basis. A site-plan/map of the subject parking site was annexed along with the NIT and it is stated that as per the said site-plan, the total area of the parking site was 42,667.851 square meters with the actual area of the parking site being 38,015.62 square meters.

b. It is stated that the minimum reserve price for submitting the bid and for grant of license was Rs. 9,45,000/- and the bid/tender could be submitted only along with a sum of Rs. 9,45,000/- being deposited as a Security Deposit.

c. The last date for submission of the bids was 05.11.2020 and the date for opening of technical and financial bids was 09.11.2020 and 17.11.2020 respectively. It is stated that as per the terms of the NIT, the successful bidder, on receipt of a Letter of Intent (LOI) was required to submit 1 (one) month’s advance rent, 3 (three) months security deposit and 4 (four) months earnest money within 7 (seven) days of receipt of the LOI.

d. It is stated by the Appellant that he relied upon the size of the parking site as being 38,000 square meters as per the NIT and submitted a bid of Rs. 36,51,000/- and duly deposited the sum of Rs. 9,45,000/- as security deposit.

e. It is stated that while bids were opened on 17.11.2020, the Appellant was issued the LOI dated 05.10.2021 only on 11.10.2021 via e-mail, informing the Appellant/Petitioner that his bid had been accepted. The Appellant *vide* e-mail dated 13.10.2021 accepted the LOI issued to him.

f. It is stated by the Appellant, as 11 months had passed since the date of security amount being deposited and due to the COVID-19 pandemic, the Appellant had suffered a lot in his business and *vide* letters dated 14.10.2021 and 25.10.2021 the Appellant requested the Respondent Corporation to grant him 5-6 months' time to deposit the requisite amount as per the terms of NIT.

g. In response to the said request made by the Appellant, the Respondent Corporation issued a provisional allotment letter dated 11.11.2021, thereby, granting him the license to run the subject parking site and to deposit the requisite amount of Rs. 2,82,63,000/- on or before 31.01.2022.

h. Thereafter, the Appellant deposited the advance monthly license fee of Rs. 36,51,000/- and the Respondent Corporation issued a letter dated 18.11.2021 asking the Appellant to run the subject parking site. It is stated that the Appellant took possession of the subject parking site on the same day itself.

i. It is stated that the Appellant deployed 10 separate parking attendants and put up a porta cabin, sign boards, yellow paint and CCTV Cameras so that the parking could be run smoothly & efficiently. However, the Appellant states that the local shop-keepers restrained him from using any area of more than 5005 square meters stating that only that much area had been transferred by the DDA to the Respondent and nothing more than that could be used for parking purposes. The Appellant is stated to have reported the matter to the local police and traffic police and *vide* letter dt. 22.12.2021, requested the Respondent to sort out the issue and ensure that the entire area mentioned in the plan could be used by him.

j. It is stated that on 30.12.2021, the officials of DDA visited the Parking Site, directing the Appellant not to allow the parking of vehicles beyond 5005 square meters.

k. On 31.12.2021, the Executive Engineer/NMD-2, DDA *vide* letter dt. 31.12.2021, provided the Appellant with a true copy of the Possession Slip dt. 19.12.2019, showing that only an area admeasuring 5005 square metres had been transferred to the Respondent. On the same day, the Executive Engineer/NMD-2, DDA also requested the Deputy Commissioner, R.P. Cell, of the Respondent to rectify the error in the area of the Parking Site.

l. On 10.01.2022, the Appellant requested the Deputy Commissioner, R.P. Cell of the Respondent to resolve the matter of the difference in the Parking Area and to ensure that the Parking Site is completely handed over to the Appellant. The Appellant on 18.01.2022, requested the Respondent to get a proper demarcation

done of the entire Parking Site. Thereafter, the Appellant on 27.01.2022 requested the Commissioner of the Respondent to intervene in the matter and get a joint survey of the Parking Site executed.

m. The Respondent, *vide* letter dt. 23.02.2022 and 04.03.2022 directed a joint inspection of the Parking Site. Accordingly, a survey was conducted on 05.03.2022 in the presence of the Appellant and the officers of the DDA and a Joint Inspection Report as well as Site Plan was prepared.

n. On 08.03.2022, the Appellant *vide* letter dated 07.03.2022 deposited the monthly license fee *vide* Demand Draft No. 006131 which was accepted by the Respondent.

o. The Appellant through letters dated 23.03.2022 and 08.04.2022 requested the Respondent to inform him of the balance amount, if any, which is to be paid by him and to execute the License Agreement in his favour. It is stated by the Appellants that instead of executing the agreement, the Respondents had put the parking site for fresh tenders *vide* corrigendum/addendum No. 1 dated 11.04.2022 issued *vide* letter No. DC/RP Cell/NDMC/2022/D-44. The Appellant has stated that the officers of the Respondents threatened the Appellant that the entire amount of Rs. 1,31,98,000/- deposited by him would be forfeited and he would be debarred from submitting any tenders and would be blacklisted.

p. In this background, the Appellant preferred WP(C) No. 6454/2022 against the Respondent alleging that the Respondents actions are arbitrary, capricious, mala fide, contrary to law and

amount to a violation of the fundamental rights of the Appellant guaranteed under Articles 14, 19 and 21 of the Constitution of India.

q. The Learned Single Judge, after hearing the parties at length on 25.04.2022 reserved the judgment, and on 29.04.2022 dismissed the writ petition on the ground that the Respondent had been operating under a “mistake of fact” and the courts would not interfere in a tender/contractual matter as long as the award of contract was carried out in a *bonafide* manner and in public interest. The Learned Single Judge held that the Petitioner-therein had filed the writ petition as a disguised plea of specific performance and the appropriate remedy available to the Petitioner is that of a civil suit.

3. The relevant paragraphs of the order passed by learned Single Judge dated 29.04.2022, as contained in paragraphs 13 to 35 read as under:

“13. I have heard learned counsels for the parties and am inclined to dispose of the writ petition itself rather than decide the application for stay.

14. From the facts noted hereinabove, it is apparent that initially NIT dated 09.10.2020 was issued by the respondent for licensing the parking site in question at Timarpur with Auto CAD Map area of 38,015.62 sq. m. The petitioner was the highest bidder and was consequently issued an LOI dated 05.10.2021 by the respondent wherein it was mentioned that the same was subject to fulfilment of other terms and conditions which included payment of one month quoted advance MLF, the amount equivalent to three months quoted MLF as security deposit, and an FDR equivalent to four months quoted MLF in favour of the respondent. The aforesaid amounts were required to be deposited within 7 working days from the date of issuance of the LOI.

15. As required, the petitioner communicated his acceptance. Subsequently, a provisional letter of allotment dated 11.11.2021

was issued to him, indicating that the provisional allotment was subject to signing of contract between the parties. Admittedly, no contract was ever signed by the parties pursuant to the issuance of the LOI and/or the provisional allotment letter. The said allotment letter read as follows:-

“Provisional Allotment Letter

A letter of intent was issued to you vide No. DC/RP-Cell/NDMC/2021/D-755 dated 05.10.2021 being a H-1 bidder of parking site situated at Truck Parking Timarpur, Delhi/Civil Lines Zone and as per the Terms and Conditions, you are directed to accept Letter of Intent and deposit the requisite amount within 07 days.

In reference to the above said Letter of Intent, your request dated 18.10.2021 and 25.10.2021 has been received in this office wherein you are submitted that you are not in a position to immediately deposit the Security Deposit and earnest money and you are willing to deposit the quoted Monthly Licence Fee, if the possession is handed over to you and the balance amount will be deposited within 04-06 months with applicable charged/interest.

Your request has been examined and Competent Authority vide his Orders dated 11.11.2021 accorded approval to run the aforesaid parking site purely on the provisional/temporary basis subject to the fulfilment of following conditions :-

- 1. You will deposit one month MLF of Rs.36,51,000/- + TCS within 48 hours of issuing this Provisional Allotment Letter.*
- 2. You will deposit the Monthly License Fee on or before 05th of the every month is subsequent months failing which the possession of the site will be immediately taken over by the North DMC from the parking contractor without further communication.*

3. You will deposit the entire Security Deposit i.e. Rs.2,82,63,000/- by 31.01.2022 failing which the provisional allotment will be cancelled and physical possession of the site will be taken without further communication and shall be proceeded for further allotment as per procedure decided by North DMC including e-tender.

You are hereby directed to submit an undertaking that will comply with the above mentioned conditions. You should deposit one Month License Fee i.e. Rs.36,51,000/- + TCS @ 2% within 48 hours of issuance of this letter and take over the possession of the parking site without fail, failing which North DMC shall be free to take further action as deemed appropriate.”

16. According to the respondent, the petitioner failed to fulfil the conditions stated in provisional allotment letter inasmuch as he did not submit the security deposit of Rs. 2,82,63,000/- and was found in breach of the terms of provisional allotment.

17. However, according to this Court, the issue is not just of failure of the petitioner to comply with the payment terms of the provisional allotment letter, but also of the respondent's failure to handover the complete tendered parking area of 38,015.62 sq. m. to the petitioner. After the site was handed over to the petitioner, he was prevented from operating the complete tendered area of 38,015.62 sq. m. and was restricted to a significantly reduced area of 5,005 sq. m. From the facts, it is discernible that the DDA has claimed ownership of remaining area and alleged that respondent's ownership is restricted only to 5,005 sq. m. It has also questioned the respondent's competence to license anything in excess of 5,005 sq. m. In this backdrop, it appears that the parking area at the site admeasuring 38,015.62 sq. m. tendered by the respondent in the first place was a mistake of fact on the part of the respondent.

18. The issue raised is also as to whether or not the petitioner can prevent the respondent from retendering the parking site by inviting fresh bids on the plea of legitimate expectation? The

answer is in negative.

19. *It is the petitioner's own case that the act of the respondent in handing over a parking site, the area in possession whereof is far less than the one that was tendered, is fraudulent and illegal. Yet, the petitioner is seeking allotment of the reduced parking area with proportionate reduction in the security deposit/MLF that was required to be made as per the provisional allotment letter dated 11.11.2021. Once the petitioner has chosen to challenge the allotment and justified his refusal to make deposits under the provisional allotment letter on the ground that the same is not enforceable, he cannot in the same breath seek allotment of the parking site with amended terms and conditions through an order of the Court.*

20. *It is for the respondent to decide if it is willing to consider the allotment of the parking site with the reduced area to the petitioner, given the fact that the petitioner was the highest bidder in the NIT dated 09.10.2020 and had been issued LOI. However, till date the respondent has not made any such offer of concession to the petitioner and has instead decided to retender the parking site. The petitioner cannot as a matter of right demand that the respondent be directed to allot him the parking site with reduced area on modified terms and conditions. As stated above, in the absence of any such concession being made by the respondent, this Court cannot direct the respondent to enter into a modified contract with the petitioner and dictate the terms of such contracts. It is a settled law that Courts cannot rewrite contracts.*

21. *This Court is of the opinion that the petitioner's right to seek redressal of his legal injury, if any, due to respondent's faulty actions in inviting tender for a parking site, which it did not fully own, as well as was incompetent to tender, and the right of the respondent to retender the site, are mutually exclusive.*

22. *The respondent's decision to retender the parking site cannot be faulted with since the subject matter of tender has fundamentally changed. In the NIT dated 09.10.2020 an area of 38,015.62 sq. m. was tendered, whereas in the retender corrigendum notice dated 11.04.2022, a significantly reduced*

area of 5,005 sq. m is offered. The dynamics of the two offers will completely change. A larger parking site may attract lesser number of participants and similarly, a smaller parking site may attract an increased number of participants in the tender. The terms and conditions of the offer may completely change.

23. *The petitioner's legal remedy against the respondent's alleged illegal action of not being able to handover the tendered site to the petitioner despite accepting deposits from him, is by way of seeking specific performance of the LOI or Provisional Allotment letter dated 11.11.2021, if at all the same is still made out in law on the facts of the case, and not by way of a writ petition.*

24. *At this stage, it is deemed apposite to advert to the decisions in Jagdish Mandal v. State of Orissa and Others reported as (2007) 14 SCC 517, Maa Binda Express Carrier and Another (Supra), Bharat Coking Coal Limited and Others v. AMR Dev Prabha and Others reported as (2020) 16 SCC 759 and Uflex Ltd. (Supra), wherein the scope of judicial review in tender/contractual matters, while exercising extraordinary jurisdiction under Article 226 of the Constitution of India, has been indicated to be limited.*

25. *The principles governing the exercise of judicial review in tender/contractual matters are well-settled. A perusal of the judicial dicta on the subject would show that Court(s) in seisin of said matters are ordained to determine the following issues/questions:-*

i) *Whether the process adopted or decision made by the authority is malafide 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 of the Constitution of India. However, 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. Further, a constitutional Court in tender/contractual matters shall be concerned only with lawfulness of a decision, and not its soundness [Refer: Jagdish Mandal (Supra), Maa Binda Express Carrier (Supra) and Bharat Coking Coal Limited (Supra)].

26. *Insofar as the question of malafide is concerned, this Court does not find that the retendering by the respondent is actuated by malice or malafide intent. It is noticed that there is no sufficient pleading of malafides in the petition, barring a bald averment. Besides, issuance of an NIT for a parking site that could not have been tendered in the first place can at best be said to be an act of sloppiness on the part of the respondent but it cannot be termed as a malafide act aimed at the petitioner. Likewise, the act of retendering of the parking site by the respondent in the present case seems to be actuated by the need to rectify its original mistake. The same cannot be stretched to cast aspersions on the respondent's intent, in the absence of specific plea in the petition supported by credible evidence. On the other two principles laid down by the Hon'ble Supreme Court, as referred to above, this Court does not find the actions of the respondent to be unreasonable or arbitrary so as to warrant interference, by stalling the process of retendering. This Court also does not see any public interest involved in the matter that would justify intervention.*

27. *On the aspect as to whether there was a concluded contract between the parties, this Court is guided by the observations made by the Supreme Court in Rishi Kiran Logistics Private Limited (Supra), wherein the right of the respondent/Port Trust to cancel the initial tender process in absence of a concluded contract was recognised and it was held:-*

“45. We again emphasise that the issue of the argument of there being a concluded contract is raised in a petition filed under Article 226 of the Constitution and not by way of suit. The issue whether there was a concluded contract and

breach thereof become secondary and is examined by us with that limited scope in mind. In such proceedings main aspect which has to be is as to whether impugned decision of the Port Trust was arbitrary or unreasonable. It is also important to remark that in a given case even if it is held that there was a concluded contract, whether specific performance can be ordered or not would be a moot question in writ proceedings. The appellant took the calculated risk in not going to the civil court and choosing to invoke extraordinary jurisdiction of the High Court, which is also discretionary in nature.” (emphasis added)

28. Reference may also be made to South Delhi Municipal Corporation (Supra), where the Supreme Court was in seisin of a case similar to the present case, inasmuch as the tender initially invited by the South Delhi Municipal Corporation was cancelled and a fresh tender issued. The Court observed that the decision of the Corporation to cancel the initial tender was not violative of Article 14 of the Constitution of India, as the same was not established to have been actuated by malafide in order to favour any particular bidder. Excerpt from the decision, relevant to the present case, is reproduced hereunder:-

“18.6. Further, the High Court has failed to consider another important fact that the Government being guardian of public finance it has the right to refuse the lowest or any other tender bid or bids submitted by the bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of the Constitution of India. The appellant Corporation's decision in cancelling its earlier tender is not in violation of Article 14 of the Constitution of India, as the High Court did not find any mala fide intention on the part of the appellant Corporation to favour someone in taking such decision. The appellant Corporation's decision in cancelling the earlier tender notice

vide corrigendum dated 30-11-2012 and then issuing a subsequent tender notice dated 13-12-2012 inviting fresh bids from eligible persons for the same works was with a bona fide intention to get better and reasonable rates from the bidders for the execution of the works and not to show favouritism in favour of any bidder. ...”

29. *Recently in, Bharat Coking Coal Limited and Others (Supra), it was held as under:-*

“28. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106; Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC, (2014) 11 SCC 288] Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. [Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617] However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

xxx

31. *In cases where a constitutional right is*

infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.”

30. *In view of the above decisions, it is deemed expedient to not delve into determination of the question whether or not there was a concluded contract between the parties.*

31. *The petitioner has referred to the decisions in Kusheshwar Prasad Singh (Supra) and Haryana Financial Corporation and Another (Supra) to canvass the proposition of law that the respondent cannot take advantage of its own wrong. However, in my considered view, it is not a case of the respondent taking advantage of its own wrong. Rather, it is a case of the respondent ‘correcting’ its own wrong. No advantage is gained by the respondent over the petitioner’s rights through their actions when the petitioner has not acquired any vested right in the site/area as discussed above. Besides, the petitioner has a right to take appropriate legal action against the respondent for legal injury, if any, caused to him.*

32. *Before parting with the issue, it may also be observed that prima facie, the respondent appears to have been under a “mistake of fact” regarding the parking area available with it at the time of inviting the initial tender, which was clarified only when the petitioner started operating at the parking site and faced resistance. For that reason, it was necessitated that*

the parking area be retendered. As such, the act of tendering and cancellation of the initial tender by the respondent, and the subsequent issuance of a corrigendum/addendum, cannot be said to have been arbitrary or unreasonable. Moreover, in case the respondent had continued with the process of allotment under the initial tender, which suffered from a deficiency/error, the same would have eventually raised questions of legality and propriety.

33. *Notably, in exercise of power under Article 226 of the Constitution of India, the Court would not interfere in a tender/contractual matter even if a procedural aberration or prejudice to a tenderer is made out, as long as the award of contract and/or the tender process was carried out bonafide and in public interest. Accordingly, under writ jurisdiction, this Court is not inclined to entertain a disguised plea of specific performance.*

If at all, the petitioner feels aggrieved by the actions of the respondent, he is at liberty to seek appropriate remedy by way of a civil suit. It is clarified that observations made hereinabove shall not prejudice the respective rights and contentions of the parties that may arise in any legal proceedings that might be pursued before an appropriate forum.

34. *At the same time, however, keeping in view the facts and circumstances of the case, this Court deems it expedient in the interest of justice to direct that in case the petitioner is desirous of participating in the retender issued by way of corrigendum/addendum dated 11.04.2022, the respondent may permit him to do so, subject to fulfilment of conditions thereof. The respondent is directed to issue an appropriate NOC, to enable the petitioner to participate in the retender, if he so desires.*

35. *With the above observations, the present petition is dismissed. Miscellaneous applications are disposed of as infructuous.”*

4. Mr. Ajay Verma, Learned Senior Counsel on behalf of the Appellant submits that Appellant's bid was made on the basis of the area provided for in the NIT dated 09.10.2020, and the Appellant was the successful bidder in

the said tender. He contends that the Respondent had made a misrepresentation in the NIT regarding the area of the parking site, and instead of rectifying the area upon conducting a survey, the Respondent Corporation decided to retender the parking site. He contends that this amounts to a violation of the fundamental rights of the Appellant. He submits that there are no reasons given for the decision to re-tender the said Parking site.

5. Mr. Verma submits that the Learned Single Judge has erred in relying on the contention of the Respondents-herein that there was no contract between the Respondent Corporation and the Petitioner. It is his submission that his bid was accepted by the Respondent, and an LOI was issued to the Appellant, which was accepted by him and an Allotment Letter was subsequently issued to the Appellant. The Appellant was given an extension of time by the Respondent Corporation regarding payment and the possession of the said parking site was also handed over, and payments were made by the Appellant towards the monthly fee payable to the Respondent Corporation, and payment towards the same were accepted even after the survey was conducted. It is his submission that all of the aforesaid acts establish that there was a contract concluded between the parties. He further submits that the NIT itself constitutes a contract between the parties.

6. It is submitted by Mr. Verma that the Learned Single Judge has erred as the Appellant was not challenging the Tender of 2020 before the writ court, but was challenging the arbitrary, unfair and mala fide decision of not rectifying the area of the parking site and re-tendering the said parking site instead of reducing the Monthly License Fee payable by the Appellant.

7. It is further submitted by Mr. Verma that the Ld. Single Judge's reliance upon the decisions in *South Delhi Municipal Corporation v. Ravinder Kumar & Anr.*, (2015) 15 SCC 545; *Rishi Kiran Logistics Pvt. Ltd. v. Board of Trustees of Kandla Port Trust & Ors.*, (2015) 13 SCC 233; *Maa Binda Express Carrier & Anr. v. North East Frontier Railway & Ors.*, (2014) 3 SCC 760; and *Uflex Ltd. v. Govt. of Tamil Nadu & Ors.*, (2022) 1 SCC 165; is incorrect and the aforesaid decisions are inapplicable to the facts and circumstances of the present case.

8. Mr. Verma submits that the actions of the Respondent Corporation are arbitrary, capricious, unreasonable, unfair and violative of Article 14. He submits that the Respondent Corporation accepted payment from the Appellant, even though the Appellant was not permitted to use the entirety of the area prescribed in the NIT. He states that the Appellant has invested substantive amount of money and effort into the site. He states that the Appellant has paid a sum of Rs. 1.31 Crore in good faith to the Respondent Corporation. He contends that decision of the Respondent Corporation to re-tender the subject parking site, instead of rectifying the monthly fee payable by the Appellant herein is unfair and arbitrary. He states that the Appellant is being treated in this manner for no fault of his as it was the Respondent Corporation which has made an error in informing the Appellant about the area of the said parking site. He has stated that the monthly license fee payable, as set by the Respondent Corporation herein is based upon the total area of land, whereas the actual area of the parking site, transferred to the MCD by the DDA was only 5005 square metre. It is his contention that the action of the Respondent to call for bids, for an incorrect area of a parking site, transferred over an year prior to the bid and then accepting the highest

bid of the Appellant and accepting monthly license fee payable based on that incorrectly specified area amounts to fraud played by the Respondent Corporation. He relies upon the decision in *Kusheshwar Prasad Singh v. State of Bihar & Ors*, (2007) 11 SCC 447; and *Haryana Financial Corporation & Anr. v. Rajesh Gupta*, (2010) 1 SCC 655 in support of his argument.

9. It is submitted by Mr. Verma that the conduct of the Appellant has been *bona fide* unlike the conduct of the Respondent Corporation. He states that the Appellant has at all times complied with the directions of MCD. The Respondent on the other hand and induced the Appellant to invest substantially in the site and pay an amount of Rs. 1.31 Crores and after rectifying the area of the parking site, it ought to have reduced the monthly license fee payable but chose not to do so.

10. It is further submitted by Mr. Verma, that the Respondent herein is trying to wish away the NIT dated 09.10.2020 and all acts done thereunder by re-tendering the said parking site, after the bid of the Appellant herein had been accepted, and the parking site allotted to him. He contends that the Ld. Single Judge cannot justify the actions of the Respondent on the ground that it was a mistake.

11. Mr. Verma submits that the actions of the Respondent is also in violation of the principles of natural justice, as no hearing was provided to the Appellant before taking any decision to its detriment, especially after the Appellant had made huge investments into the subject Parking Site.

12. Mr. Verma relies upon the judgments in *Mihan India Ltd. v. GMR Airports Ltd.*, 2022 SCC Online SC 574; *Akash Exploration Services v. ONGC*, Manu/GJ/1207/2019; *Sical Logistics Ltd. v. Mahanadi Coalfields*

Ltd., 2017 (II) ILR-CUT-1035 (DB); *State of U.P. v. Sudhir Kumar Singh*, 2020 SCC OnLine SC 847; and *J.S. Luthra Academy & Anr. v. State of J&K*, (2018) 18 SCC 65, in support of his submissions.

13. Mr. Sanjay Poddar, Learned Senior Counsel appearing on behalf of the Respondent Corporation, at the outset, have submitted that the Ld. Single Judge has correctly refused to exercise its writ jurisdiction under Article 226 of the Constitution of India. He has highlighted that there exists an arbitration clause, under Clause 32 of the terms and conditions of the NIT and the Appellant herein was aware of the same, and yet chose to approach this Court by way of a writ petition, which is incorrect. He submits that the Respondent Corporation provided the Appellant full access to the terms and conditions of the NIT, and the bidders were required to peruse the same before submitting their bids for the tender. One of the conditions of the NIT was that the bidder was required to upload a signed copy of the terms and conditions of the NIT and this was done by the Appellant herein. He submits that it is clear that the Appellant has perused the terms and conditions of the NIT in entirety and is also aware of the Arbitration Clause under Clause 32 of the NIT at the time of filing of the underlying Writ Petition.

14. It is further submitted by Mr. Poddar that the Appellant's decision to file a writ petition, and not refer the dispute to arbitration, while being aware of the arbitration clause under the NIT amounts to a waiver of the Appellant's right to refer the dispute to arbitration under Section 3 and 8 of the Arbitration & Conciliation Act, 1996.

15. It is submitted by Mr. Poddar, that the Respondent Corporation, being a public body discharging public function with public funds, has not acted in a *mala fide* manner and has merely attempted to rectify a *bona fide* mistake

by re-tendering the parking site *vide* the corrigendum dated 11.04.2022. The *bona fide* actions of the Respondent Corporation can be seen from the Respondent's decision to accommodate the Appellant when he was unable to pay 8 month's Monthly License Fee deposit by 12.10.2022 as per the Letter of Intent issued to him. The Respondent has also permitted the Appellant to continue at the parking site during pendency of the present appeal even though no interim order has been passed in favour of the Appellant herein.

16. It is further submitted by Mr. Poddar that despite the *bona fide* actions of the Respondent Corporation to accommodate the Appellant, the Appellant has reused to make any payment since March 2022, even at the proportionately reduced Monthly License Fee of Rs. 16,38,636/- as cited in the corrigendum dated 11.04.2022. This proportionately reduced amount was calculated on the basis of ECS recalculated by one Deepali Consulting Engineers, which participated in the joint inspection of the parking site on 05.03.2022, which included the Appellant, officials of DDA, the Respondent and an Independent Agency being Deepali Consulting Engineers.

17. Mr. Poddar has brought to the attention of the Court, the terms and conditions of the NIT regarding the payment of Fixed Deposit/Security Deposit and the Monthly License Fee. He has drawn our attention to Clause 5(a) of the terms and conditions of the NIT titled "Responsibility of tenderer before offering bid". The said clause provides that the tenderer shall inspect the parking site which will be given on an 'as is where is' basis and the tenderer may obtain necessary clarification if any regarding the same to his full satisfaction before offering bid for the same. It further provides that no objection shall be entertained post the award off the LOI and any dispute

that appears later shall be the responsibility of the contractor. He therefore submits that it was the Appellant's responsibility to acquaint himself of all local/parking site conditions before offering the bid and the Appellant cannot be allowed to raise a dispute regarding the same now. He states that the Appellant failed to comply with mandatory provisions of the NIT and there is no agreement between the parties, which is a mandatory condition for availing the benefit under the said tender.

18. Mr. Poddar submits that even if the contention of the Appellant herein is accepted, that the Respondent Corporation has made a misrepresentation of facts, then it was open to the Appellant herein to avoid the contract, however the Appellant herein has not done so and continued to reap the benefits of operating the subject parking site and earn parking fee without paying the monthly license fee to the Respondent. Not only has the Appellant refused to pay the amount due, it is also not allowing the Respondent Corporation to re-tender the parking site.

19. Mr. Poddar further submits that the total arrears of Monthly License Fee due to the Respondent Corporation till 14.01.2023 by the Appellant is Rs. 5,22,73,174/-. The Appellant is clearly making an undue gain by operating the said parking site, in the absence of an interim order of this Court, by not paying the Monthly License Fee to the Respondent since March 2022 and not allowing the Respondent Corporation to re-tender the said parking site in a *bona fide* manner. Such conduct on part of the Appellant disentitles the Appellant from any discretionary relief.

20. Mr. Poddar relies upon the judgments in ***Sudhakar Tiwari v. Delhi Development Authority***, 2016 LAWPACK (Delhi) 58880; ***Kalabharati Advertising v. Hemant Vimalnath Narichania and Ors.***, (2010) 9 SCC 437;

Thomas Cook (India) Ltd. v. Hotel Imperial & Others, 127 (2006) DLT 431; and *Rajesh Kumar Singh v. South Delhi Municipal Corporation*, 271 (2020) DLT 325 (DB) in support of his submissions.

21. Heard learned senior counsels appearing for the parties and perused the material on record.

22. At the outset, it is apposite to examine the Impugned Judgment of the Learned Single Judge. The following aspects emerge from a reading of the said judgment:

a. The Learned Single Judge has noted that the Respondent Corporation had issued a provisional letter of allotment dated 11.11.2021 to the Appellant, indicating that the provisional allotment was subject to certain conditions, including the signing of a contract between the parties, which admittedly has not been done.

b. The Learned Single Judge has observed that the Appellant's right to seek a redressal of his legal injury caused by the Respondent, if any, and the Respondent's right to re-tender the subject parking site are mutually exclusive.

c. It is observed that the Respondent's decision to retender the parking site cannot be faulted with since the subject matter of the tender has fundamentally changed and the dynamics of the two offers will also change, therefore the terms and conditions of the offer may also change with a change in the area of the subject parking site.

d. The Learned Single Judge noted that the scope of judicial review of a Court in exercise of its powers under Article 226 of the Constitution of India in tender/contractual matters is limited.

e. Regarding the plea of *mala fide* made by the Appellant herein, the Learned Single Judge observed that there is no sufficient pleading of *mala fides* in the petition, barring a bald averment. With regard to the issuance of an NIT for a parking site that could not have been tendered in the first place can at best be an act of sloppiness made due to a mistake of fact and not *mala fide* as alleged by the Appellant-herein, and the act of re-tendering by the Respondent is to rectify its original mistake.

f. The Learned Single Judge has relied upon the decision in ***Rishi Kiran Logistics Private Limited*** (Supra), ***South Delhi Municipal Corporation*** (Supra), and ***Bharat Coking Coal Limited and Others*** (Supra) to state that it was not expedient for the Court in exercise of its writ jurisdiction to delve into the determination of the question whether or not there was a concluded contract between the parties.

g. The Learned Single Judge noted that the present case is not a case where the Respondent is taking advantage of its own wrong, as no advantage has been gained by the Respondent, but rather it is a case of the Respondent correcting its own wrong.

h. It has been observed by the Learned Single Judge that *prima facie* the Respondent appears to have been under a mistake of fact and has not acted in an arbitrary or unreasonable manner.

i. Lastly, it has been observed by the Learned Single Judge that if the Appellant-herein is aggrieved by the actions of the Respondent, he is at liberty to seek appropriate remedy by way of a civil suit, and writ jurisdiction of the Court is not the appropriate remedy. The Appellant was permitted to participate in the re-tender, if the Appellant so desires.

23. At this juncture, this Court deems it appropriate to outline that the scope of interference by a Court exercising power of judicial review in respect of contract entered into on behalf of the State. It has been observed consistently by the Supreme Court in several judgments that the Court may interfere in an administrative decision, if and only if the same is arbitrary, irrational, unreasonable, *mala fide* or biased. The Hon'ble Supreme Court in ***Tata Cellular v. Union of India***, (1994) 6 SCC 651, has stated as follows:

“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.”

24. The Hon'ble Supreme Court in ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)***, (2016) 8 SCC 622; relying upon ***Tata Cellular*** (supra) and ***Jagdish Mandal v. State of Orissa***, (2007) 14 SCC 517, held that if an administrative decision is not arbitrary, irrational, unreasonable, *mala fide* or biased, the Courts will not judicially review the decision taken. A contract is a commercial transaction, meaning thereby that evaluating tenders and awarding contracts are essentially commercial functions and principles of equity and natural justice stay at a distance. If the decision

relating to award of contract is bona fide and in public interest, the 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 cannot be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes.

25. Summing up the principles laid down in *Tata Cellular* (supra), *Jagdish Mandal* (supra), *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*, (1989) 3 SCC 293; and *Central Coalfields* (supra), the Hon'ble Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, stated:

“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)

26. In *Silppi Constructions Contractors v. Union of India*, (2020)16 SCC 489, the Hon'ble Supreme Court has followed the aforesaid judgments and reiterated the principle that Courts should exercise a lot of restraint while exercising powers of judicial review in contract or commercial matters. The relevant portion of the Judgment is reproduced 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.**" (emphasis supplied)*

27. From the aforesaid judgments, it is clear that the scope of interference by way of judicial review in commercial matters is extremely limited and can only be justified when a case of arbitrariness, unreasonableness, *mala fide*, bias or irrationality is clearly made out. In the absence of the same, the Courts should exercise restraint and not interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.

28. In view of the aforesaid, we do not find any merit in the submission made on behalf of the Appellant, that the Learned Single Judge has erred by relying upon the decisions in *South Delhi Municipal Corporation* (Supra),

Rishi Kiran Logistics Pvt. Ltd. (Supra), ***Maa Binda Express Carrier &Anr.*** (Supra) and ***Uflex Ltd.*** (Supra). We find no infirmity in the observations made by the Learned Single Judge that the scope of interference in a tender matter or a matter pertaining to government contracts is extremely limited and that the Court should be circumspect in exercising its writ jurisdiction in such matters.

29. As per the facts of the case, the Respondent issued a provisional allotment letter dated 11.11.2021 to the Appellant herein. The provisional allotment was done on the basis of certain conditions to be fulfilled by the Appellant. Admittedly, the parties before us have not entered into an agreement as per Clause 8 of the terms and conditions of the NIT and the Appellant has been in possession of the subject parking site on the basis of the provisional allotment letter. The provisional allotment letter dated 11.11.2021 is reproduced hereinbelow for the sake of convenience:

“

Provisional Allotment Letter

A letter of intents was issued to you vide No. DC/RP Cell/ NDMC/2021/D-755 dated 05.10.2021 being a H-1 bidder of parking site situated at Truck Parking Timarpur, Delhi/Civil Lines Zone and as per the Terms and Conditions, you are directed to accept Letter of Intent and deposit the requisite amount within 07 days.

In reference to the above said Letter of Intent, your request dated 18.10.2021 and 25.10.2021 has been received in this office wherein you are submitted that you are not in a position to immediately deposit the Security Deposit and earnest money and you are willing to deposit the quoted Monthly License Fee, if the possession is handed over to you and the balance amount will be deposited within 04-06 months with applicable charged/interest.

You are request has been examined and Competent Authority vide his Orders dated 11.11.2021 accorded approval to run the aforesaid parking site purely on the provisional/temporary basis subject to the fulfilment of following conditions:-

- 1) You will deposit one month MLF of Rs.36,51,000/- + TCS within 48 hours of issuing this Provisional Allotment Letter.*
- 2) You will deposit the Monthly License Fee on or before 05th of the every month is subsequent months failing which the possession of the site will be immediately taken over by the North DMC from the parking contractor without further communication.*
- 3) You will deposit the entire Security Deposit i.e. Rs.2,82,63,000/- by 31.01.2022 failing which the provisional allotment will be cancelled and physical possession of the site will be taken without further communication and shall be proceeded for further allotment as per procedure decided by North DMC including etender.*

You are hereby directed to submit an undertaking that you will comply with the above mentioned conditions. You should deposit one Month License Fee i.e. Rs.36,51,000/- + TCS @ 2% within 48 hours of issuance of this letter and take over the possession of the parking site without fail, failing which North DMC shall be free to take further action as deemed appropriate .

Sd./

Administrative officer

R.P. Cell/North DMC"

30. A perusal of the aforesaid provisional letter of allotment, along with the terms and conditions of the NIT makes it clear, that the Appellant was required to deposit a Monthly License Fee with the Respondent Corporation every month, failing which the possession of the subject parking site will be resumed by the Respondent Corporation. The Appellant has admittedly

failed to pay the Monthly License Fee to the Respondent Corporation since March 2022. At the same time, the Appellant has alleged *mala fide* on part of the Respondent Corporation and challenged the action of the Respondent Corporation to re-tender the subject parking site. It is pertinent to note that the Appellant had requested the Respondent Corporation to deposit the Security Deposit at a later date, when it was unable to do so at that time, and the Respondent Corporation had accordingly graciously granted time to the Appellant to make the deposit at a later date.

31. In the opinion of this Court, the Appellant is attempting to blow hot and cold at the same time, when it fails to pay the monthly license fee to the Respondent, which it is required to do, while at the same time not permitting the Respondent Corporation to re-tender the subject parking site. In the absence of an agreement between the parties as per Clause 8 of the terms and conditions of the NIT, and the fact that the Appellant has not been paying the monthly license fee to the Respondent Corporation, we do not see how a right accrues in favour of the Appellant herein, to continue operating the subject parking site and prevent the Respondent Corporation from re-tendering the said parking site. Consequently, in the absence of such a right, the Appellant's cannot insist on being heard before the Respondent takes an action to re-tender the subject parking site. We, therefore, find no merit in the submissions of the Appellant that the actions of the Respondent are *mala fide* or suffer from arbitrariness/unreasonableness or that there has been a violation of principles of natural justice.

32. The Respondent Corporation, when it issued the initial NIT dated 09.10.2020, was under the impression that the parking site in question had an area of 38,015.62 square meters. Throughout the tender process, the

subsequent issuance of LOI to the Appellant, the issuance of the provisional allotment letter and the possession slip, the Respondent Corporation had been proceeding on the assumption that the area of the subject parking site is 38,015.62 square meters. It is only after the Appellant had come in the possession of the subject parking site that the Respondent Corporation was informed of, and came to know that the DDA had only transferred an area of 5005 square meters to the Respondent Corporation. In such a scenario, we do not agree with the submission of the Appellant that the Respondent Corporation has made a misrepresentation regarding the area of the subject parking site. It is clear from the facts, that the Respondent Corporation was unaware of the correct area of the subject parking site, and the NIT dated 09.10.2020 had been issued under a mistake of fact. The action of the Respondent Corporation to re-tender the subject parking site has been taken to rectify this mistake of fact. The reliance of the Appellant on the decisions in *Kusheshwar Prasad Singh* (supra) and *Haryana Financial Corporation & Anr.* (supra) is wholly misplaced.

33. The Respondent Corporation has also highlighted that there exists an arbitration clause in Clause 32 of the terms and conditions of the NIT, and if the parties fail to amicably settle the dispute between them, the dispute may be referred to arbitration. Admittedly, the parties have not referred the dispute to arbitration and it is the submission of the Respondent herein that the Appellant's have waived their right to settle dispute amicably and refer the dispute to arbitration. This Court does not consider it expedient to determine whether such a right has been waived by the Appellant, however this Court is in agreement with the Learned Single Judge, that in respect of any injury that may been caused by the Respondent to the Appellant, a writ

court is not the appropriate forum. The appropriate remedy for any injury caused to the Appellant by the actions of the Respondent would be before an appropriate civil forum.

34. In view of the aforesaid, we find no infirmity in the judgment passed by the Learned Single Judge, dismissing the underlying writ petition. A private party cannot be permitted to use the writ jurisdiction of this Court under Article 226 of the Constitution of India, to agitate a dispute, which is primarily commercial in nature and arises out of a contract between the parties. The Appellant has failed to show any *mala fide*, arbitrary or unreasonable action on behalf of the Respondent Corporation. Accordingly, the challenge to the Impugned Judgment preferred by the Appellant herein fails. The Appellant is at liberty pursue the appropriate civil remedies before an appropriate civil forum.

35. With these observations, the appeal is dismissed, along with pending application(s), if any.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SUBRAMONIUM PRASAD)
JUDGE

MAY 01, 2023