

(2009) 12 SC CK 0039

In the Supreme Court Of India

Case No : Civil Appeal No. 7907 of 2009 (Arising out of S.L.P. (C) No. 363 of 2009) and Civil Appeal No's. 7908 and 7909 of 2009 (Arising out of S.L.P. (C) No's. 426 and 510 of 2009)

Brihan Mumbai Electric Supply Transport Undertaking and
Another

APPELLANT

Vs

Laqshya Media P. Ltd. and Others

RESPONDENT

Date of Decision : 01-12-2009

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226

Mumbai Municipal Corporation Act, 1888 — Section 460A, 460K, 460K(C), 460L, 460M

Citation : AIR 2010 SC 5 : (2010) 1 BomCR 87 : (2009) 14 JT 495 : (2009) 8 MLJ 1554 : (2009) 14 SCALE 247 : (2010) 1 SCC 620 : (2009) 15 SCR 1218 : (2010) 1 UJ 21

Hon'ble Judges : K. G. Balakrishnan, C.J.; P. Sathasivam, J.; J. M. Panchal, J

Bench : Full Bench

Final Decision : Allowed

Judgement

P. Sathasivam, J.—Leave granted.

2. All these appeals are directed against the final order and judgment dated 19.11.2008 passed by the High Court of Judicature at Bombay in Writ Petition No. 1344 of 2007 whereby the High Court allowed the writ petition filed by Laqshya Media Private Limited and Alok Jalan of Mumbai and set aside the work orders/contracts awarded to Bennett Coleman & Co. Ltd.- Respondent No. 4 and Prithvi Associates- Respondent No. 5 by the Brihan Mumbai Electric Supply & Transport Undertaking (hereinafter referred to as the "BEST") in respect of Bus Queue Shelters and directed the BEST to invite fresh tenders as required u/s 460M of the Mumbai Municipal Corporation Act, 1888 (in short "MMC Act"). Aggrieved by the said order, the BEST has filed S.L.P.(C) No. 363 of 2009, Prithvi Associates has filed S.L.P.(C) No. 426 of 2009 and Bennett Coleman & Co. Ltd. has filed SLP (C) No. 510 of 2009. Since all the appeals question the correctness of the very same order of the High Court, they are being disposed of by the

following common order.

3. For convenience, let us refer the parties as arrayed in Civil Appeal arising out of SLP (C) No. 363 of 2009. Laqshya Media Pvt. Ltd. and one Alok Jalan of Mumbai (Respondent Nos. 1 and 2 herein) approached the High Court of Bombay under Article 226 of the Constitution of India seeking to issue a writ of mandamus in the nature of direction to the BEST, an undertaking of the State of Maharashtra (Appellant No. 1 herein) to invite fresh tenders from the public by terminating the work orders/contracts awarded to Bennett Coleman & Co. Ltd and Prithvi Associates - Respondent Nos. 4 & 5 herein under the tender and to restrain the BEST from extending or modifying the terms of the work orders/contracts awarded to Respondent Nos. 4 and 5 following the tender system. According to the appellants, on 31.03.2005, the BEST floated a tender for awarding contracts of sole agency for advertisement rights on Bus Queue Shelters in Brihan Mumbai for 2005-2008. For operational ease, the entire area of Brihan Mumbai was divided into three lots, namely, Lot No. 1 - Eastern Suburbs, Lot No. II - the Western Suburbs and Lot No. III - the City. Tenderers were required to offer lump- sum display charges for the period of contract, i.e., till December, 2008. The tenders received would be evaluated on the basis of total lump-sum display charges offered by the tenderers for an individual lot. The contract would be awarded for individual lots to different agencies depending on the offers received. Respondent Nos. 1 and 2 herein, also participated in the said tender for awarding contracts of sole agency for advertisement rights on Bus Queue Shelters in Brihan Mumbai. But, as Bennett Coleman & Co. Ltd. (in short 'BCCL') - Respondent No. 4 was the highest bidder for Lot No. II - the Western Suburbs and Lot No. III - the City and Respondent No. 5, Prithvi Associates was the highest bidder for Lot No. I - the Eastern Suburbs, the tender came to be allotted in favour of them. However, no formal contract was signed between the BEST and the BCCL and the Prithvi Associates and that the tender came to be allotted on the basis of the acceptance letters/work orders issued by the BEST which was contrary to Clause 24 of the Conditions of Contract.

4. In December, 2006, the BEST floated the offer document for erection of Bus Queue Shelters in place of existing Bus Stop Poles and display of advertisement thereon under "First Finder Scheme" (hereinafter referred to as the 'Scheme'). Respondent Nos. 1 and 2 tendered their bid for the Scheme. It was their grievance that the tender having been called only for display of advertisement on existing Bus Queue Shelters till 31.12.2008 not only is an unilateral extension thereof but an act of arbitrariness and discrimination. It is their further grievance that under the guise of extension, BEST favoured BCCL and Prithvi Associates by granting them a long extension and new benefits under the original tender. The action of the authorities in negotiating for extension of the work orders without issuing tenders and their action in refusing to act in fair and transparent manner or to disclose their intention are arbitrary, discriminatory, illegal, mala fide, contrary to the terms of the tender and violation of the fundamental rights and thereby deprived Respondent Nos. 1 and 2 of their rights guaranteed under

Article 19(1)(g) of the Constitution of India, hence, they prayed for appropriate directions by way of writ of mandamus.

5. Before the High Court, the BEST filed an affidavit through its Chief Engineer explaining their stand. It was stated therein that under the Scheme there is no question of competitive bidding and parties are free to choose the specific Bus Stops they wish to develop. The writ petitioners (Respondent Nos. 1 and 2 herein) themselves selected 22 bus stops under the Scheme without competitive bidding. Respondents 4 & 5 who, under their earlier licences/contracts dated 09.06.2005 and 04.07.2005 respectively, had secured the right to advertise on existing Bus Queue Shelters which was valid till 31.12.2008, were invited by the 2nd appellant as suggested by the BEST Committee to participate in the Scheme with reference to the existing bus shelters under their control for modernizing the same.

6. It is the further case of BEST that the Government of Maharashtra had constituted an Empowered Committee under the Chairmanship of the Chief Secretary to monitor the progress of implementation of Mumbai Transformation Project. The Committee consisted of the Chief Secretary and other Secretaries of various departments. Its agenda, Item No. 2(v) referred to beautification of bus shelters and Item No. (6) of the said Minutes of the Meeting referred to presentation to be made on bus shelters and the approval of the model of Modern Bus Queue Shelters presented by the BEST. As per the decision recorded in the meeting dated 02.09.2006 of the Empowered Committee, the BEST obtained prior approval from the BEST Committee vide BCR 474 dated 07.12.2006 for erection of Bus Queue Shelters in place of bus stop poles and display of advertisement thereon. The idea was to call for bids to develop the Bus Queue Shelters on the basis of the Scheme. Interested parties such as Respondent Nos. 1, 2, 4, and 5 could bid for as many Bus Stop Poles as they may wish to develop and were free to choose any location they preferred. Consequently, in implementation of the Scheme, the BEST in the month of December, 2006 offered to interested persons, documents for erection of Bus Queue Shelters in place of the existing bus stop poles.

7. In response to the offer put up by the BEST, Respondent Nos. 1 & 2 and other 12 parties came forward with their proposal for construction/erection of Modern Bus Queue Shelters in place of existing Bus Stop poles. All the 13 parties were allotted with the work of construction of modern Bus Queue Shelters. Against 2,384 bus stop poles available under the Scheme, they were able to award only 483 bus stop poles and that too, to 13 different parties. The Respondent Nos. 1 and 2 had also submitted proposal for construction of modern Bus Queue Shelters under the Scheme and were successful in getting 22 BEST bus stop poles. Under the Scheme, there is no tender procedure and the party who brings their proposal first is entitled to work.

8. The BEST Committee, by their proceedings, dated 27.12.2006 had approved the proposal of successful parties under the Scheme. Since the "Mumbai

Transformation Project" related to entire Mumbai, the BEST Committee, while approving the said proposals, also suggested to the BEST that it should invite a proposal from Respondent Nos. 4 and 5 who held all Bus Queue Shelters in Eastern, Western Suburbs and the City till the year 2008 in case they desire to construct the modern Bus Queue Shelters in place of Old Bus Queue Shelters under their respective jurisdiction. This suggestion of BEST Committee had been communicated to Respondent Nos. 4 and 5 with a request to submit their proposal in the prescribed format. Respondent Nos. 4 and 5 had existing licences with BEST in respect of display of advertisements on Bus Queue Shelters. Respondent No. 4 is in possession of 702 Bus Queue Shelters in the Western Suburbs "Lot No. II" and 717 Bus Queue Shelters in the City zone "Lot No. III" under Work Order dated 09.06.2005. Respondent No. 5 is in possession of 724 Bus Queue Shelters in the Eastern Suburbs "Lot No. I" under Work Order dated 14.07.2005. As per the original terms of the licences, they were valid up to 31st December, 2008 with an option to renew up to 31st December 2009. Since, the idea of the Empowerment Committee was to implement the Mumbai Transformation Project, it was felt that all Bus Queue Shelters in the city should be modernized including those which are being operated by Respondent Nos. 4 and 5. Pursuant to the suggestions of the BEST Committee, the decision was communicated to Respondent Nos. 4 and 5, and they expressed their interest in constructing modern Bus Queue Shelters as per the model approved by the Empowerment Committee in the place of existing Bus Queue Shelters which were under their contract. After prolonged discussion, the proposal of Respondent Nos. 4 and 5 was put to the BEST Committee for its consideration with the relevant documents and details. BEST Committee in its meeting dated 12.06.2007, after detailed discussion, approved the proposal of Respondent Nos. 4 and 5 with certain modification in the terms and conditions. By the new contract with Respondent Nos. 4 and 5, the expected increase of revenue for the BEST is to the tune of Rs. 69 lakhs per month. The aforesaid contract was for a period of 15 years with effect from 01.10.2007 and Respondent Nos. 4 and 5 are liable to pay increased rate of display charges as per the renewed terms. There is neither impropriety nor there is any illegality. The design of modern Bus Queue Shelters are approved by the Empowered Committee of Government of Maharashtra and since Respondent Nos. 4 and 5 agreed to reconstruct all the Bus Queue Shelters except those Bus Queue Shelters which are situated within the Bus Station at their own cost as per the model approved by the Empowered Committee, the BEST had awarded the said contract for 15 years with effect from 01.10.2007. Under the present contract, Respondent Nos. 4 and 5 are required to reconstruct all the Bus Queue Shelters in the pattern approved by the Empowered Committee and also pay display charges from 01.10.2007 onwards at the revised rates.

9. Respondent Nos. 4 and 5 who were awarded contract by the BEST also filed their affidavit conveying their stand. According to them, there is no illegality in the award of contract since they were having valid existing licences for the

display of advertisements on all those Bus Queue Shelters till 31st December, 2008 and renewable till 31st December, 2009 at the told contractual rates. There is no illegality or impropriety whatsoever. All the reconstructed Bus Queue Shelters are for greater public good and will provide world class infrastructure to the city of Mumbai, added to it, the BEST is continuously earning revenue there from.

10. By the impugned order, the Division Bench of the High Court after holding that the subject contract had been awarded to Respondent Nos. 4 and 5 bypassing the statutory provisions by negotiation on the terms and conditions offered by them as if no other party were ready to do it on better terms and conditions, quashed the Work Order/Contract awarded to Respondent Nos. 4 and 5 and directed the BEST to invite fresh tenders as required u/s 460M of MMC Act of 1888.

11. Heard Mr. G.E. Vahanvati, learned Attorney General for India for the BEST, Mr. Harish N. Salve, learned senior counsel for Prithvi Associates, Mr. K.K. Venugopal, learned senior counsel for Bennett Coleman & Co. Ltd., Mr. Mukul Rohtagi, learned senior counsel and Mr. P.H. Parikh, learned senior counsel for the Laqshya Media Pvt. Ltd. and for Alok Jalan.

12. The following issues that are to be considered are:

(i) Whether the appellants were justified in awarding work order/contract in favour of Respondent Nos. 4 & 5 without resorting to public tender?

(ii) Whether proviso to Sub-section (2) of Section 460M of the Mumbai Municipal Corporation Act enables the BEST to award contract without inviting tenders?

(iii) Whether the High Court is justified in setting aside the work order/contract to Respondent Nos. 4 & 5 and directing BEST to invite fresh tenders as required under Sub-section (1) of Section 460M of the Mumbai Municipal Corporation Act?

13. Initially, the BEST administration floated a tender in 2005 for sole advertisement rights on Bus Queue Shelters. It is not in dispute that in the said tender, Prithvi Associates, BCCL and Laqshya Media P. Ltd. had participated, however, the contract was awarded to Prithvi Associates and BCCL - Respondent Nos. 4 & 5 herein. The said contract was for a period of three years, which was to expire on 31.12.2008 with an option for extension of one year till 31.12.2009. Admittedly, there is no dispute about the said tender. This contract was only for display of advertisements on the existing Bus Queue Shelters and there was no obligation on the part of the successful parties to carry out any construction or maintenance or repairs of the said shelters.

14. The BEST, in consultation with the Government of Maharashtra, introduced a Scheme known as "First Finder Scheme" in December, 2006 whereby interested parties were invited to choose and select Bus Queue Poles in the city of Mumbai, as per their liking, for the purposes of converting them into modernized Bus Queue Shelters and display of advertisements thereon. It is relevant to point out

that this Scheme contemplated both construction of Bus Queue Shelters in the place of bus poles, maintenance of the same and also display of advertisements. This Scheme was for a longer period, i.e., ten years. Display charges for the said modernized Bus Queue Shelters to be built by the successful applicants was fixed by the BEST. According to the BEST administration, 2384 poles were offered under the Scheme out of which 2136 bus poles were applied for. However, only 483 bus poles were finally allotted inasmuch as many of the participants had evinced more interest only on the saleable poles. It was brought to our notice that approximately 1/3rd of the bus poles could be allotted for conversion into Bus Queue Shelters. Laqshya Media P. Ltd. - first respondent herein, applied for 200 bus poles and was finally allotted only 22. It is relevant to mention that bus poles were allotted on first come first serve basis through open offer and there was no tender floated by the BEST. Those contracts under the Scheme were allotted u/s 460K(c) of the Act. Since the response was found to be poor under the Scheme, a decision was taken to implement the Mumbai Transformation Project of 02.09.2006. It was considered that, (a) Respondent Nos. 4 & 5 had contracts valid till December, 2009 extendible till December, 2009; (b) There were many advertisers already advertising under contracts entered into by the Appellant and the 4th respondent; and (c) The First Finder Scheme had been a complete failure as only 1/3rd poles got to be taken. In such a situation, in order to make a uniform renovation of all bus shelters whether saleable or non-saleable, the appellants were asked to give their proposals. Under the 2007 contract, the earlier tender contract of 2005 in favour of Respondent Nos. 4 & 5 was extended on the terms and conditions of the Scheme in order to include all those bus shelters which had been allotted to them for the purposes of display of advertisements. By this extension or new contract, Respondent Nos. 4 & 5 had to construct new and modernized bus shelters in the entire city of Mumbai. The said decision was taken pursuant to the Mumbai Transformation Project undertaken by the Empowered Committee meeting held on 02.09.2006. As stated earlier, the said project envisaged, inter alia, modernization of all bus shelters and bus poles.

15. Before going into the correctness of the decision arrived at by the Empowered Committee and the ultimate work order by the BEST in favour of Respondent Nos. 4 & 5, it is useful to refer the relevant provisions from the Act. Section 460A empowers the General Manager to manage the BEST and perform all acts necessary for the economical and efficient maintenance, operation, administration and development of the Undertaking. Among the various provisions, we are very much concerned with Sections 460K, 460L and 460M of the Act which reads as under:

460K. Making of contracts

With respect to the making of contracts for the purposes of the Brihan Mumbai Electric Supply and Transport Undertaking (including contracts relating to the acquisition and disposal of immovable property or any interest therein, or any right thereto) the following provisions shall have effect, namely:

(a) every such contracts shall be made on behalf of the corporation by the General Manager;

(b) no such contract for any purpose which, in accordance with any provision of this Chapter, the General Manager may not carry out without the approval or sanction of some other municipal authority, shall be made by him until or unless such approval or sanction has first been duly given;

(c) no contract which will involve an expenditure exceeding ten lakhs rupees shall be made by the General manager unless the same is previously approved by the Brihan Mumbai Electric Supply and Transport Committee:

Provided that, where the previous approval of Committee is sought for any such contract by the General manager, the Committee shall consider and dispose of such proposal within thirty days from the date of on which the item is first included in the agenda of any meeting of the Committee, failing which, the previous approval shall be deemed to have been given by the Committee for such contract on the last day of the period of thirty days aforesaid. A report to that effect shall be made by the General Manager to the Committee;

(d) every contract made by the General Manager involving an expenditure exceeding one lakh rupees shall be reported by him within fifteen days after the same has been made to the Brihan Mumbai Electric Supply and Transport Committee;

(e) the foregoing provisions of this section shall, as far as may be, apply to every contract which the General Manager shall have occasion to make in the execution of this Act; and the same provisions of this section which apply to an original contract shall be deemed to apply also to any variation or discharge of such contract.

460L Mode of executing contracts.

(1) Every contract entered into by the General Manager on behalf of the corporation for the purposes of the Brihan Mumbai Electric Supply and Transport Undertaking shall be entered into in such manner and form as would bind the General Manager if such contract were on his own behalf, and may in the like manner and form be varied or discharged:

Provided that every contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding ten lakh rupees or for the disposal of property of the corporation exceeding twenty-five thousand rupees in value shall be in writing and shall be signed by the General Manager and countersigned by two members of the Brihan Mumbai Electric Supply and Transport Committee.

(2) No contract which is not executed in accordance with the provisions of Sub-section (1) shall be binding upon the corporation.

460M Mode of executing contracts.

(1) Except as is hereinafter otherwise provided, the General Manager shall, at least seven days before entering into any contract for the execution of any work or the supply of any materials or goods which will involve an expenditure exceeding fifty thousand rupees, given notice by advertisement in the local newspapers inviting tenders for such contract.

(2) The General Manager shall not be bound to accept any tender which may be made in pursuance of such notice, but may accept, subject to the provisions of Clause (c) of Section 460K, any of the tenders so made which appears to him, upon a view of all the circumstances, to be the most advantageous:

Provided that the Brihan Mumbai Electric Supply and Transport Committee may authorize the General Manager for reasons which shall be recorded in their proceedings to enter into a contract without inviting tenders as herein provided or without accepting any tender which he may receive after having invited them.

A reading of the above provisions makes it clear that the General Manager is the ultimate authority in all respects including maintenance, operation, administration and development of the BEST. Sub-section (1) of Section 460M makes it clear that for execution of any work or the supply of any materials or goods which will involve an expenditure exceeding fifty thousand rupees, the General Manager is mandated to give notice by advertisement in the local newspapers inviting tenders for such contract. However, proviso to Sub-section (2) enables the BEST Committee to authorize the General Manager to enter into a contract without inviting tenders as provided in Sub-section (1) or without accepting any tender which he may receive after having invited them. The only condition is that the BEST Committee has to specifically authorize the General Manager and reasons for deviating for inviting tender are to be recorded in writing before such authorization.

16. Mr. Mukul Rohtagi and Mr. P.H. Parikh, learned senior appearing for the Laqshya Media P. Ltd. and Alok Jalan, by drawing our attention to the 'heading' of Section 460M submitted that it is but proper to give importance to the same. The heading of the Section reads as under:

Tenders to be invited for contracts involving expenditure exceeding rupees fifty thousand.

In support of the above contention, they relied on the following decisions of this Court:

1. Industrial Finance Corporation of India Ltd. Vs. The Cannanore Spinning and Weaving Mills Ltd. and Others,
2. The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.,
3. K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another,
4. H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior and

Others Vs. Union of India and Another,

5. British Airways Plc. Vs. Union of India and ors,

6. Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Cock and Chem. Ltd. and Others, .

The ratio in all these cases leads to a conclusion that heading in a particular section lends, though not normally a part of the statutory provision, assistance in interpreting the statutory intent since the 'heading' always serves as a guide to depict the intention. It also makes it clear that the marginal note to a section cannot be referred to for the purpose of construing the section but it can certainly be relied upon as indicating the drift of the section. It also shows that the heading/marginal notes, prima facie, furnish some clue as to the meaning and purpose of the section. In the light of the above principles, we hold that the 'heading' of 460M has some bearing while construing the Sub-sections (1) & (2) therein.

17. Coming to the language of Sub-section (1) of Section 460M that "tenders to be invited for contracts involving expenditure exceeding rupees fifty thousand", learned senior counsel heavily relied on the following decisions of this Court:

- 1) Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others,
- 2) Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another,
- 3) Ram and Shyam Company Vs. State of Haryana and Others,
- 4) Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others,
- 5) Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others,
- 6) M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others,
- 7) Aggarwal and Modi Enterprises Pvt. Ltd. and Another Vs. New Delhi Municipal Council,
- 8) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,

In all these cases, this Court has emphasized that the public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. It also emphasizes that the authority should justify the action assailed on the touchstone of justness, fairness, reasonableness and as a reasonable prudent owner.

18. In the light of the abovementioned legal principles enunciated by this Court, let us test the decision of the BEST in awarding work orders/contract in favour of

Respondent Nos. 4 & 5. Sub-section (1) of Section 460M makes it clear that the General Manager is one who authorized to manage and perform all acts necessary for efficient maintenance, operation, development and administration of the BEST. It also emphasizes that in all action or execution of any work including supply of materials or goods which exceeds fifty thousand rupees, the General Manager is bound to give notice by advertisement in the local newspaper inviting tenders for such work orders/contracts. However, Mr. Vahanvati, learned Attorney General, appearing for the BEST, Mr. Harish N. Salve and Mr. K.K. Venugopal, learned senior counsel appearing for the successful contractors, submitted that while there is no doubt about the proposition mentioned above, however, pointed out that proviso to Sub-section (2) of Section 460M authorizes the General Manager to enter into a contract without inviting tenders as provided in Sub-section (1) and the only condition is that the BEST Committee has to authorize him by recording adequate reasons. It is not in dispute that the 'First Finder Scheme' was introduced in December, 2006 whereby interested parties were invited to choose and select Bus Queue Poles in the city of Mumbai as per their liking for the purpose of converting them into modernized Bus Queue Shelters and display of advertisements thereon. It was pointed out that approximately only 1/3rd of the poles could be allotted for conversion into shelters. Even one of the contesting parties, namely, Laqshya Media P. Ltd. applied for 200 bus poles and was finally allotted only 22. According to the BEST, as the response was found to be poor under the Scheme and taking note of the fact that Respondent Nos. 4 & 5 have contracts valid till December 2008 extendible till December, 2009, in order to make a uniform renovation of all Bus Queue Shelters and to implement the Mumbai Transformation Project, they were asked to give their proposals. From this it is clear that the BEST administration wanted to implement the Mumbai Transformation Project at the earliest and the initial work under the 'First Finder Scheme' was not fully successful as estimated. Annexure P-5 which is available in Vol.II placed by the appellant - BEST shows that it obtained approval from the BEST vide BCR 474 dated 07.12.2006. Annexure P-6 is the approval given by the BEST Committee vide BCR 507 dated 27.12.2006. Since it was heavily contended that the BEST Committee approved the proposal to engage Respondent Nos. 4 and 5 instead of public tender in order to implement the Mumbai Transformation Project as early as possible, let us verify the materials placed by the appellants.

THE BRIHAN MUMBAI ELECTRIC SUPPLY & TRANSPORT UNDERTAKING

(BRIHAN MUMBAI MAHANAGARPALIKA)

CIVIL ENGINEERING BRANCH Item No. 356 27 December, 2006

NOTE TO THE BEST COMMITTEE DATED 26.12.2006

Ref : GM/AGM(c)/373/2006

Sub: Erection of Bus Queue Shelters in place of existing Bus Stop Poles and display of advertisement thereon under First Finder Scheme

1. The BEST Committee vide BCR 474 dated 07.12.2006 has approved the introduction of First Finder Scheme in the Undertaking for converting the bus stop poles into Bus Queue Shelters.

2. Accordingly, the Scheme was notified in local newspaper on 11.12.2006. In response, various advertising agencies have submitted their offers in the prescribed forms issued by the Undertaking. As on 18.12.2006, offers have been received from 20 agencies. The First Finder for bus stop poles applied by the Agencies have been finalized, according to the serial number on the receipt of process fee of Rs. 750/- per bus stop pole paid by these agencies.

3. Accordingly, the list of agencies have been prepared along with the No. of location applied by these agencies for erection bus queue shelters in place of existing bus stop poles, which are as under:

S. Name of Agency No. of Bus No. of Bus Receipt No. No. stop poles stop poles applied for proposed to (Processing be allotted fee)

1. M/s Pioneer 129 Nos. 129 Nos. 0040827 Publicity Corporation 11.12.06

2. M/s Symbiosis 40 Nos. 3 Nos. 0040831 Advertising 11.12.06

3. M/s Shreeji 150 Nos. 81 Nos. 0040834 Enterprises 11.12.06

4. M/s Clear channel 90 Nos. 31 Nos. 0040835 Communication (I) Pt. Ltd. 11.12.06

5. M/s Manta Media 40 Nos. 2 Nos. 0040836

11.12.06

6. M/s Shivraj 55 Nos. 12 Nos. 0040838 Advertising 11.12.06

7. M/s S.V. Advertising 125 Nos. 58 Nos. 0040839

11.12.06

8. M/s Prabha 200 Nos. 73 Nos. 0040841 Advertising 11.12.06

9. M/s One ad Display 82 Nos. 10 Nos. 0040847 Pvt. Ltd. 11.12.06

10. M/s Prachar 450 Nos. 202 Nos. 0040851 Communication Ltd. 11.12.06

11. M/s Medial Tacks 18 Nos. Nil 0040856

11.12.06

12. M/s Attitude 25 Nos. 5 Nos. 0040857

11.12.06

13. M/s J.C. Decauz 400 Nos. 116 Nos. 0040873 Advertising India Pvt. Ltd. 11.12.06

14. M/s Positive Advt. 30 Nos. Nil 0040878 Pvt. Ltd. 11.12.06

15. M/s Enkon Pvt. Ltd. 20 Nos. 2 Nos. 0040879

11.12.06

16. M/s Times Media 14 Nos. 1 Nos. 0040891 Publication 11.12.06

17. M/s Sporting & 26 Nos. 1 Nos. 0040910 Outdoor Solution 12.12.06

18. M/s OM Jal 30 Nos. 6 Nos. 0040912

12.12.06

19. M/s Laqshya Media 200 Nos. 22 Nos. 0040915 Pvt. Ltd. 12.12.06

20. M/s Ashok Sharma 12 Nos. 11 Nos. 0041013 & Associates Pvt. Ltd. 14.12.06

Total 2136 Nos. 765 Nos.

4. It is pertinent to point out here that as per Clause 47 of the Terms & Conditions of Contract, the Agency has to pay an amount of Rs. 750/- for each location of bus stop poles as processing fees, which is non-refundable. However, it is felt unjust to forfeit the said amount of processing fees of Agencies for the sites which are not awarded to them. Hence, it is proposed to refund the said amount of processing fees to the Agencies for the sites which are not awarded to them.

5. Further, while approving the proposal for introduction of the scheme, the BEST Committee resolved that excluding the Property Tax, the Licence Fees, etc. shall be borne by the Agency. Hence the word 'Property Tax' shall stand deleted from the Clause (e) & 18(i) of the Terms and Conditions of the Scheme.

6. The approval of the BEST Committee is, therefore, requested.

i) To award the contract under First Finder Scheme under all Terms & Conditions' of approved scheme to 18 Agencies for 765 bus stop poles as detailed in Annexure 'A' to 'R' & Annexure 'S' under First Finder Scheme and to enter into the contract with them u/s 460' K(C)' of MMC Act-1888 as amended upto date.

ii) To refund an amount of Rs. 750/- per bus stop pole to all the agencies for the sites which are not awarded to them.

While speaking on the subject, Shri Ravi Raja stated that, the Administration had in the past, with the approval of the B.E.S. & T. Committee, awarded the contract for display of advertisements on the bus queue shelters of the Undertaking by dividing the same between the firms M/s. Prithvi Associates & M/s. Bennet & Coleman within the limits of the Brihan Mumbai Mahanagar Palika. He further stated that, instead of constructing the bus queue shelters by the BEST Undertaking, if the said Agencies construct the bus queue shelters within the limits of the Brihan Mumbai Mahanagar Palika, they may be permitted to display the advertisements on the said bus queue shelters. Also, they may be included in the said scheme.

The General Manager stated that, if the said Agencies are complying with the terms and conditions of the Scheme by constructing new bus queue shelters in place of the existing bus queue shelters, they will also be included in the said Scheme.

The Chairman stated that, if the concern Agencies approach the Undertaking for construction of new bus queue shelters in place of the existing bus queue shelters and if the said Agencies are fulfilling the terms and conditions of the Scheme, they may be included in the said Scheme.

Thereafter, as there was no further discussion in the matter, the Chairman put the proposal submitted by the Administration to vote and since it was not opposed by anyone, he declared that it was carried unanimously.

Thereafter

507 No. 507- Resolved: "That, the approval be and is hereby given to the proposal containing Para No. 6 of the Note of the Committee.

19. The contract in favour of Respondent Nos. 4 and 5 for modernization and advertising on new BQS was approved by the BEST Committee vide item No. 112 dated 12.06.2007 as under:

Ref: Note to the BEST Committee dated 08.06.2007 No. GM/AGM(C)/114/2007.

148. No. 148 - RESOLVED: "That approval be and is hereby given, as required u/s 460 K(e) of the Mumbai Municipal Corporation Act, 1888 as amended upto date of extend the contracts as proposed in para No. 6 to 9, except sub-para (B) of para No. 9 of the note to the Committee.

2. "That, approval be and is hereby also given for extension period of the contract and display charges as per this Scheme shall start from the 1st October, 2007, instead of from the 1st day of following month in which the said proposal is approved by the BEST Committee, as proposed in sub-para (B) of para 9 of the Note to the Committee.

B.C.R. No. 148 Sd/- Dated 12.06.2007. SECRETARY AGM(C)

20. By pointing out the approval given by the BEST, the appellants submitted that no expenditure is to be incurred by the BEST. On the other hand, the Corporation is to earn both from the display charges and the construction of bus Queue Shelters, which belong to the Corporation itself and at the end of the 15 year term, revert back to the Corporation. It is the Respondent Nos. 4 and 5 who are to spend money on modernization as per the approved plan of BEST and maintenance of BQS and in return the BEST is to receive revenue on display charges payable by Respondent Nos. 4 and 5. In these factual aspects, it was pointed out that there has been no violation of any statutory provision in awarding the contract in favour of respondent Nos. 4 and 5.

21. It is not in dispute that the initial tender contract awarded to respondent

Nos. 4 and 5 was up to 31.12.2008 and extendable for a period of one year. However, it was only for display of advertisement in the Bus Queue Shelters and not the construction of any Bus Queue Shelters. The Mumbai Beautification Project was envisaged on 02.09.2006 under which one of the resolutions was to beautify all the bus shelters in the city of Mumbai. As part of the said project, BEST came up with the Scheme in December, 2006. The main grievance of the BEST was that there was no proper response in respect of non-saleable bus shelters, hence BEST administration on 27.12.2006, decided that in order to implement the Mumbai Transformation Project and ensure uniformity in the modernization process of BQS and bus queue poles in the city of Mumbai, it was agreed that the Scheme should be extended to Prithvi Associates and BCCL. The said Meeting was attended by the Chairman as well as the General Manager of the BEST. It was pointed out that item No. 356 dated 27.12.2006 (which we have extracted above) clearly records suggestion made by both the General Manager and the Chairman of the BEST to initiate dialogue and negotiations with Prithvi and BCCL for the purpose of modernization of the BQS who were using the same for displaying advertisement under the 2005 contract, there is no procedural illegality and violation of any statutory provisions.

22. The appellants heavily relied on the note placed before the BEST Committee and approval for entrusting the work relating to BQS in favour of Respondent Nos. 4 and 5. It was pointed out that during the discussion in the meeting dated 27.12.2006 one Shri Raviraja, one of the Committee members, had mentioned the firms of Prithvi Associates and BCCL who were awarded contract for display of advertisements in the BQS. He suggested that instead of constructing the BQS by the BEST undertaking, if the said agencies (Prithvi Associates and BCCL) construct BQS within the limits of Brihan Mumbai Mahanagar Palika, they may be permitted to display the advertisements on the said BQS. By pointing out the same, he requested that they may also be included in the Scheme. The note - Item No. 356 further shows that the General Manager has expressed that if the said agencies are complying with the terms and conditions of the Scheme by constructing new BQS in the place of existing BQS, they will also be included in the said Scheme. The Chairman also expressed the same view. Thereafter, the Chairman put the proposal submitted by the administration to vote, since it was not opposed by anyone, he announced that it was carried unanimously. It may be relevant to mention that the Empowered Committee consisted of the Chief Secretary and other top administrative officers of various Departments including the General Manager of the BEST.

23. In the light of the language used in Sub-section (1), we are of the view that calling for tenders is a rule and finalizing any contract without inviting tenders as provided in Sub-section (1) is an exception. We have already adverted to various decisions of this Court as to how properties belonging to Central/State/its instrumentalities are to be dealt with. Learned senior counsel appearing for the appellants as well as Respondent Nos. 4 and 5 pointed out that all the decisions relied on by Respondent Nos. 1 and 2 related to the sale of public properties,

hence those principles are not applicable to the case on hand. They also highlighted that as per the contract, Respondent Nos. 4 and 5 have to build bus shelters as designed by the BEST, advertise, earn income and also pay the agreed amount to the BEST and after 15 years all the bus shelters have to be handed over to the BEST administration. In other words, according to them, there is no element of sale or disposal of public property as claimed by the contesting respondents. It is true that by entering into a contract with Respondent Nos. 4 and 5, the BEST administration has not lost its title over the property, but on the other hand assured of getting regular income without any financial implications apart from providing better facilities for the public.

24. We have already extracted the entire note placed before the Committee for discussion which did disclose reasons for not adhering to public tender and entering into a contract with Respondent Nos. 4 and 5 alone. The 'Note' also discloses that thorough discussion was held among the members of the Committee, General Manager and Chairman. There is no sale or element of sale in the impugned transaction. However, to ensure fairness in the activities of the State and public authorities, their dealing should be above board. Nothing should be done by the public authorities which gives an impression of bias, favoritism and ordinarily these factors would be absent if the matter is brought to public auction by inviting tenders. We have no doubt that in exceptional cases having regard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but clearly that should not be done without adequate reasons as it shakes the public confidence. In the case on hand, in view of proviso to Sub-section (2) of Section 460M, BEST Committee after due deliberation authorized the General Manager to enter into contract without inviting tenders, since it is beneficial to the BEST and general public.

25. The materials placed show that (a) the contractors, namely, Respondent Nos. 4 and 5 were having existing agreement with the BEST administration for the display of advertisements in the bus shelters/poles till 31.12.2008 and extendable by one more year (b) In the First Finder Scheme in spite of wide publicity, response was very poor and only 483 saleable bus shelters/poles allotted (c) Mumbai Transformation Project requires urgent attention and timely completion of the work (d) Due to enormous financial implication, BEST was not in a position to undertake demolition and construction of new bus shelters (e) By this method, the BEST without spending their money through the existing contracts (Respondent Nos. 4 and 5) could complete the modernization work and also earn sizeable income by way of advertisement (f) Ownership always lies with the BEST, after expiry of the contractual period these bus shelters revert back to the BEST.

26. In the light of the above discussion, we arrive at the following conclusion:

(a) Generally disposal of public properties owned by the State or its instrumentalities should be by public auction by inviting tenders. In the case on

hand, the bus shelters belong to the BEST and Respondent Nos. 4 & 5 were permitted to build bus shelters as per the norms, display advertisements and pay charges to the BEST in terms of contract.

(b) Proviso to Sub-section (2) of Section 460M enables General Manager to deviate the process of inviting tenders subject to reasons duly recorded by the BEST Committee.

(c) Empowered Committee of BEST consisting of the Chief Secretary and other senior officers of various departments after deliberation and taking various relevant aspects authorized the General Manager to finalise the work with Respondent Nos. 4 & 5 since they are having existing contract in advertisement in bus shelters/poles. Further, the 'First Finder Scheme' was not successful.

(d) By Mumbai Transformation Project, the BEST is to complete the work relating to bus shelters without any financial commitment and also get its share of revenue.

(e) By this contract with Respondent Nos. 4 & 5, the BEST administration is assured of not only regular revenue but also better facilities to the general public as well.

27. It is brought to our notice that even during the hearing before the High Court it was submitted that pursuant to the contract, Respondent No. 4 has constructed about 1/3rd of the total Bus Queue Shelters allotted to it and Respondent Nos. 5 has constructed about 40% of the Bus Queue Shelters allotted to it. This was the position prior to November, 2008. On 19.11.2008, the High Court while passing orders at the request of Respondent Nos. 4 and 5, suspended its order for a period of eight weeks and this Court while ordering notice on 13.01.2009, extended the order of stay. Though on equity, they can not have better claim, but the fact remains that Respondent Nos. 4 and 5 were continuing the contract work throughout during the pendency of the proceeding before the High Court and in this Court. Taking note of all these aspects and peculiar position as mentioned above and in order to render substantial and complete justice to the parties, we feel that at this juncture, continuation of the contract by BEST with the Respondent Nos. 4 and 5 is the only acceptable solution.

28. With the above conclusion, we modify the impugned order of the High Court and direct the Respondent Nos. 4 and 5 to adhere to the terms of contract strictly. We make it clear that if there is any breach or violation, BEST is at liberty to act in accordance with law. All the three appeals are disposed of on the above terms. No costs.