
(2011) 09 AP CK 0019
In the Andhra Pradesh High Court
Case No : W.A. No. 395 of 2011

M/s Icatch Communications India Ltd., M/s Brand Boutique Pvt. Ltd. and M/s Sign and Design Advertising APPELLANT

Vs

M/s Prakash Arts and Others RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Hyderabad Municipal Corporation Act, 1955 — Section 124, 125, 126, 126(1), 127

Citation : (2011) 6 ALD 545

Hon'ble Judges : V.V.S. Rao, J;Ramesh Ranganathan, J

Bench : Division Bench

Advocate : D. Prakash Reddy, for Sri. P. Radhive Reddy, for the Appellant; Anjana Taggarse Motupalli Counsel for the Respondent No. 1, Dr. Y. Padmavathi for GHMC Counsel for the Respondent Nos. 2 and 3, Not necessary vide C.T. Counsel for the Respondent No. 4 and The G.P For Municipal Administration Counsel for the Respondent No. 5, for the Respondent

Final Decision : Dismissed

Judgement

Ramesh Ranganathan

1. These three Writ Appeals are filed by respondent Nos. 4 to 6 in W.P. No. 8585 of 2010. The said Writ Petition was filed by three advertising companies/firms questioning the action of the Greater Hyderabad Municipal Corporation (for short "the Corporation") in awarding contracts by way of nomination, terming them as "pilot projects", to respondent Nos. 3 to 6 in the Writ Petition vide proceedings dated 02.09.2009, 25.01.2009 and 09.06.2009. These proceedings were challenged on the ground that the process of public auction or tender was not followed, and award of contracts by nomination was arbitrary, illegal and in violation of Article 14 of the Constitution of India. The Writ Petition was allowed by order dated 26.04.2011, and the contracts awarded in favour of respondents 4 to 6 were set aside. The learned Single Judge noted that the contract, awarded in favour of the third respondent in the Writ Petition, was terminated by

proceedings dated 02.04.2011 on account of the lapses pointed out therein and, in so far as the third respondent was concerned, the grievance of the petitioners stood redressed. The Writ Petition was allowed setting aside the orders issued by the Corporation in favour of respondent Nos. 4 to 6; the Corporation was directed to conduct auction, in relation to the very works allotted in their favour, within a period of three months from the date of the order; in case respondent Nos. 4 to 6 emerged as the highest bidders for those very works, the terms of the contract were to stand revised incorporating the outcome of the auction; if any other agency emerged as the highest bidder for the works, covered by the contracts awarded in favour of respondent Nos. 4 to 6, the latter were placed under an obligation to remove their installations; the Corporation was to get the expenditure incurred for the individual works, assigned to respondent Nos. 4 to 6, and the income derived therefrom in the form of advertisement charges evaluated by a chartered accountant; if the income had either exceeded or was equivalent to the investment, no further steps were needed to be taken; if, on the other hand, the investment was found to be more than the income, the Corporation was required to take necessary steps to pay the amount within a period of six months from the date of determination, subject to the terms of the contract between them; the Corporation was required to take steps to invite bids or tenders for installation of the equipment as was awarded to respondent Nos. 4 to 6 in other junctions, and other places in the city, as early as possible; and, in no case, was it to award such works on nomination basis. Aggrieved thereby, these three appeals are preferred.

2. The respondent corporation has not only chosen not to prefer an appeal against the order passed in W.P. No. 8585 of 2010, but has instead initiated action to comply with the order. Dr. Y. Padmavathi, learned Standing Counsel for the GHMC, would submit that, in compliance with the order of the learned Single Judge, the Corporation had, in terms of clause 16.3 of the terms and conditions of the agreement dated 04.12.2009, terminated the works allotted to the appellants on nomination basis; the appellants were directed to submit details of the expenditure incurred for installation of signages, and for erection of barricades on the central media under the Foot Over bridges, including the income derived from the display of advertisements, so as to entrust the same to a Chartered Accountant to assess the matter; the appellants were directed to hand over the barricade works, and remove the traffic signages, immediately; the Corporation has decided not to prefer an appeal against the order of the learned Single Judge; and, in compliance with the said order, to invite bids afresh through the tender process route.

3. It is convenient to classify the contentions urged on behalf of the appellants under different sub-heads.

I. CAN AWARD OF CONTRACTS BY THE GHMC TO THE APPELLANTS ON NOMINATION BASIS BE JUSTIFIED ON THE PLEA THAT THEY ARE "PILOT PROJECTS"?

4. Sri D. Prakash Reddy, learned Senior Counsel appearing on behalf of the appellants, (respondent Nos. 4 to 6 in the Writ Petition), would submit that from out of 134 traffic junctions in the GHMC area, signages were allotted to the appellants only for 9 junctions as a "pilot project"; this is hardly 6% of the total traffic junctions in the GHMC area, which itself was proof that award of work was on a trial basis, and was treated as a "pilot project"; since the works in question were in the nature of "pilot projects" the Corporation had awarded the works on nomination basis based on the proposals submitted by the appellants; it was immaterial whether the project was conceived by the GHMC or a proposal presented to it was accepted; there was no prohibition for the GHMC to accept a proposal submitted by any agency if it was found to be beneficial to the Corporation; award of contracts on nomination basis to the agency, which had conceived the project, with a view to test its utility cannot be faulted; after scrutiny of the issues at various meetings, including the need for traffic direction signages, innovative systems, and the offer made by the appellants to take up the project at their own cost by paying the required advertising fees, contracts were awarded to them; and, in such circumstances, the action of the Corporation in awarding the works on nomination basis is justified. Learned Senior Counsel would rely on 5 M and T Consultants, Secunderabad Vs. S.Y. Nawab and Another,

5. Ms. Anjana Taggarse - Motupalli, Learned Counsel for the respondent - writ petitioners, would submit that the works awarded to the appellants were signages, barricades and dustbins which were similar to the items specified under the "Fund Your City" project whereunder auctions were held in December, 2006; awarding contracts by nomination, instead of the general rule of public auction, can only be resorted to in special or exceptional circumstances which, when called upon, must be justified by the Corporation; the works awarded to the appellants were in the nature of build, operate and transfer (BOT) projects which could not be awarded as a "pilot project"; details of the contracts, and the surrounding circumstances, clearly demonstrated a lack of innovation, urgency, extenuating or exceptional circumstances etc., and did not justify award of "works", on nominations basis, terming them as "pilot projects", though it was not; the GHMC had not chosen to furnish reasons for award of works on a nomination basis, and not by auction/tender; the contracts in question were not experimental/test projects or "pilot" in nature; it was a non-transparent, unfettered, unguided and arbitrary exercise of power; even in the absence of financial outflow by the respondent-Corporation in respect of the said contracts granted by way of nomination, the Corporation would nonetheless be duty bound to determine the total worth of the contract, and follow the provisions of the GHMC Act pertaining to grant of contracts to private parties; in a "BOT" contract there should be specification of the material used, as the property has eventually to be handed over to the GHMC; a BOT contract can be entered into only after successful completion of the "pilot project"; while a "pilot project" must be innovative, there is no innovation in the concept of erecting signages/barricades/dustbins, and it has been subjected to auction even under the "Fund Your City

scheme"; the appellants' claim of innovation in the materials used is also not borne out in the contract which does not even specify the material which the appellants were required to use nor are they mandated, under the terms of the contract, to use specific material for erection of signages/barricades and the dustbins concerned; and the statutory safeguards, under Sections 124 to 129 of the GHMC Act, have been ignored in the award of such contracts to the appellants. Learned Counsel would rely on *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, *Ram and Shyam Company Vs. State of Haryana and Others*, *Collector (District Magistrate) Allahabad and Another Vs. Raja Ram Jaiswal*, *Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation*, *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, *Common Cause, A Registered Society Vs. Union of India (UOI) and Others*, *M.I. Builders Pvt. Ltd. Vs. Radhey Shyam Sahu and Others*, *S.Y. Nawab Vs. Municipal Corporation of Hyderabad*, *Noble Resources Ltd. Vs. State of Orissa and Another*, *Ravi Development Vs. Shree Krishna Prathisthan and Others*, and *P. Narayan Reddy v. State of A.P.* 2010 (3) ALD 505 (DB).

6. The standard applied by the High Court, while exercising its powers of judicial review in matters relating to award of contract by the Government/local authority, is deferential scrutiny as the Government/local authority must have the freedom of contract, and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. The decision to award contracts must, however, be free from arbitrariness, not affected by bias or actuated by malafides. *Tata Cellular Vs. Union of India*, The power or discretion to award contracts must be confined and structured by rational, relevant and nondiscriminatory standards or norms and, if such standards or norms are departed from in any particular case, the action of the Government/local authority would be liable to be struck down, unless it can be shown that such departure was based on some valid principle which in itself was not irrational, unreasonable or discriminatory. *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Ram and Shyam Company Vs. State of Haryana and Others*, *P. Narayana Reddy* 2010 (3) ALD 505 (DB)). The Executive does not have absolute discretion in the award of contracts. Certain principles have to be followed, public interest being the paramount consideration. (*Meerut Development Authority v. Association of Management Studies* 2009 (3) Supreme 429 ; *P. Narayana Reddy*¹³; *Goldstone Exports Limited and Others Vs. Government of Andhra Pradesh and Others*, . For securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. (*Meerut Dev. Authority*; *P. Narayana Reddy*).

7. Award of contracts through public tender ensures transparency, maximises economy and efficiency, promotes healthy competition among the tenderers, provides for fair and equitable treatment of all tenderers, and eliminates

irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. (Ram and Shyam Company; Nagar Nigam v. Al. Faheem Meat Exports Pvt. Ltd; P. Narayana Reddy; Goldstone Exports Limited). The Government/local authority cannot act in a manner which would benefit a private party at the cost of the State; and such action would be both unreasonable and contrary to public interest. (Kasturi Lal; P. Narayana Reddy). Philanthropy plays no part while dealing with a contractor entrusted with the execution of a contract. If the decision in respect of commercial transactions is influenced by extraneous considerations, which ought not to have been taken into account, the ultimate decision is bound to be vitiated.

8. Ordinarily the State or its instrumentalities should not give contracts by private negotiation, but by open public auction/tender after wide publicity, and thereby ensure transparency. (Nagar Nigam 2007(1) Supreme 704 ; P. Narayana Reddy). However, in exceptional circumstances and for justifiable reasons, the tender route can be deviated from and a contract can be awarded by nomination. *Netai Bag and Others Vs. The State of West Bengal and Others*, In rare and exceptional cases, having regard to the nature of the largesse or for some other good reason, a contract may be granted by private negotiation, but normally that should not be done as it shakes public confidence. (Ram and Shyam Company; Nagar Nigam; P. Narayana Reddy). There may be cases where, in the special facts and circumstances and due to compelling reasons which must stand the test of Article 14 of the Constitution, departure from this rule can be made. (Kasturi Lal; P. Narayana Reddy). Instances of such rare and exceptional cases are: (i) during natural calamities and emergencies declared by the Government; (ii) where there is a single source only; (iii) where the contractor has exclusive rights in respect of the goods or services, and no reasonable alternative or substitute exists; (iv) where the auction was held on several dates but there were no bidders or the bids offered were too low, etc. (Ram & Shyam company; Nagar Nigam; P. Narayana Reddy).

9. It is for the Court to decide, in the given facts and circumstances, whether the action complained of is unreasonable? (*Meerut Dev. Authority*; P. Narayana Reddy). It is open to the Court to review the decisionmaker's evaluation of the facts. The court will intervene where the facts taken as a whole would not logically warrant the conclusion of the decision-maker. If the weight of the facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld. (*Tata Cellular*; P. Narayana Reddy).

10. It is necessary, therefore, to briefly refer to certain facts and events both prior and subsequent to the award of contracts to the appellants by the GHMC. The prototype litter bins developed and presented by the first appellant was approved by the GHMC, allegedly, for the purpose of testing its functionality. According to the respondent Corporation, from out of the total requirement of 10,000 litter bins needed for the entire area of GHMC, only 60 had been permitted on pilot basis, in a small stretch on tank bund road; and this limited

pilot initiative was permitted to test and find a lasting solution to the problem of littering in the city. The third appellant, by their letter dated 5.6.2008, informed the Additional Commissioner (Advertisement), GHMC that they were submitting a preliminary list of locations where they intended to install barricades below the foot-over-bridges and traffic signage/s at important locations under the GHMC jurisdiction. The locations were at:-

Locations of Barricades:

Locations of Traffic Signage/s:

Under the FOB at St. Anns High School, Sec" bad

At Rasoolpura Junction

Under the FOB at Khairtabad

At Panjagutta Junction

Under the FOB at Ameerpet

At Hi-tech City Junction

11. The third appellant requested that permission be accorded for erection of barricades and traffic signage/s. The Addl. Commissioner (adv), GHMC, by his letter dated 13.06.2008, permitted the third appellant to put up barricades and traffic signages at the following locations with advertisement rights thereon, on an experimental and pilot basis, for a period of three years:

Sl. No.

Locations of Barricades

Locations of Traffic Signage/s

1.

Under the FOB at St. Anns High School, Sec"bad

At Rasoolpura Junction

2.

Under the FOB at Khairatabad

At Panjagutta Junction

3.

Under the FOB at Ameerpet

At Hi-Tech City Junction

12. They were informed that the barricades and traffic signages should be fabricated and installed as per the technical and structural norms with due

approval of the Additional Commissioner of Police (Traffic) Hyderabad; and they should pay the requisite advertisement fee for the advertisement displayed on the barricades and signages.

13. The third appellant informed the Commissioner, GHMC, by their letter dated 11.05.2009, that they had conducted a survey of junctions/intersections and thoroughfares forwarded by the Hyderabad Traffic Police in consultation with the GHMC, and were proposing forty-five traffic signages at ten locations for installation of directional signages. They requested the Commissioner, GHMC to approve and include them in the proceedings to be issued by him. By proceedings dated 13.05.2009 provisional permission was accorded for six locations/spots for installation of six traffic signages on a pilot basis for a period of eight years. Thereafter, vide letter dated 14.05.2009, the third appellant informed that, taking into consideration the capital intensive nature of the project, all 45 signages for the ten locations be considered as anything less would make the project non-viable. By proceedings dated 14.05.2009 the earlier proceedings dated 13.05.2009 was partially modified, and revised orders were issued on BOT basis for twenty traffic signages at six locations. The locations identified for installation of traffic signages were all in the up-market commercial/residential areas of Hyderabad & Secunderabad where the revenues generated, as a result of the advertisements on the signages/barricades etc, would be far higher than in most of the other areas of the twin cities. The terms and conditions stipulated were that the period of allotment would be for eight years on BOT basis; the traffic signages should be installed exactly at the specified locations; traffic signages should be installed only after obtaining technical clearance of designs and specifications from the Chief Engineer, GHMC and the Jawaharlal Nehru Technological University (JNTU); the traffic signages should be installed strictly in accordance with the design and specifications standardized and approved by the Chief Engineer, GHMC and JNTU, Hyderabad; the requisite ground rent, in addition to advertisement fee, should be paid to the GHMC; and they should enter into an agreement with GHMC after securing technical clearance from the Chief Engineer, GHMC and JNTU, Hyderabad. While the impugned proceedings were issued in the name of the third appellant, the contract was subsequently entered into with the second appellant, its sister concern.

14. The Additional Commissioner (T&T) GHMC, by proceedings dated 15.09.2010, fixed Rs. 6,00,000/- per annum for each traffic signage in terms of clause 8.2(b) of the agreement in addition to collection of advertisement fee. The second appellant (a sister concern of the third appellant) informed the Commissioner, by their letter dated 20.09.2010, that they would pay Rs. 75,00,000/- per annum in all as Annual Advertising Fee. The matter was again referred to the Committee for re-examination of the whole issue and, on the basis of their recommendations, Rs. 40.00 lakhs towards lumpsum advertisement fee was re-fixed for all the traffic signages, by proceedings dated 24.11.2010, in terms of Clause 8.2 (b) of the agreement dated 04.12.2009

subject to certain terms and conditions.

15. The proceedings, impugned in the Writ Petition against which these appeals are preferred, relate to award of works terming them as "pilot project" under the BOT (Build Operation and Transfer) model. It is necessary, therefore, to examine the scope of a "pilot project", and the BOT (build, operate and transfer) model of execution of projects. A "pilot project" is an activity or a project planned or designed as a test or a trial run to demonstrate the effectiveness of a full programme. Pilot project or scheme is defined by Chambers Dictionary-Deluxe Edition - reprint 1996 as a project or scheme serving as a guide on a small scale to a full-scale project or scheme. "BOT (Build Operate Transfer)" finds extensive application in projects executed under Public-Private partnership. Public-private partnership (PPP) describes a government/local authority venture which is funded and operated through a partnership of government/local authority and one or more private sector entities. These schemes, referred to as PPP, involves a contract between the Government/local authority and a private party in which the private party provides a public project and assumes substantial financial, technical and operational risk in the project. Typically, a private sector consortium forms a special company called a "special purpose vehicle" (SPV) to develop, build, maintain and operate the asset for the contracted period. In the BOT framework a third party, for example the public administration, delegates to a private sector entity the task of designing and building infrastructure, and to operate and maintain these facilities for a certain period. During this period the private party is entitled to retain the revenues generated by the project, but is not regarded as the owner of the facility. The facility is transferred to the public administration at the end of the concession agreement. The viability of the project for the government/local authority depends on its efficiency in comparison with the economics of financing the project with public funds. Even the government/local authority can raise or borrow money on better conditions than the private entity. Other factors could also offset this particular advantage. For example, the expertise and efficiency that the private entity is expected to bring may not be of a very high order.

16. "Pilot projects" are essentially i) on a trial basis; ii) limited in scope; iii) for a limited period of time; iv) in respect of limited numbers; v) where there is innovative activity; and (vi) the project is an experiment to test, survey and determine the feasibility of such a project. Pilot projects cannot be granted in respect of time tested projects or for an unusually long duration of time or in respect of several units or number of installations or for a large area. We are in complete agreement with the opinion of the learned Single Judge that the purport of a "pilot project" is as a measure of sample or experiment and thereunder a small fraction, of an otherwise large work, is taken up by the local authority to satisfy itself that the installation or launching of the project in its entirety would be troublefree; the characteristics of a "pilot project" are (a) the agency that launches has a definite plan to install a large number of devices with definite specifications; (b) at the threshold, the agency launches a portion of the

project or prototype of the device, on an experimental basis; and (c) once the shortcomings or defects in the functioning of the "pilot project" are noticed and rectified, or the economics worked out, the required number of devices are launched or installed; in the instant case, the Corporation did not have any idea as to the nature of devices to be installed; it did not stipulate the nature and specifications of the installations or the number, much less the cost structure; and, in the absence of a clear plan or idea as to the functions, specifications or other details of the concerned installations, it would be a misnomer to call the exercise undertaken by the Corporation a "pilot project."

17. A "pilot project" would necessarily imply innovation, a first attempt at doing something, and the requirement of monitoring the project to determine its feasibility etc., The contracts, which are the subject matter of these three appeals, do not satisfy the requisite criteria to be treated and executed as "pilot projects". Pilot projects cannot be granted in the absence of any innovative activity therein. No innovation or new technology is involved in these contracts, and similar works are being executed all over India. A similar project involving installation of traffic signages was also the subject matter of auction, under the "Fund Your City" scheme of the GHMC, in December, 2006. There can hardly be any innovation either in the technology or in the specifications of materials used in installing signages and in erecting barricades and litter bins. Neither the impugned proceedings nor the contracts entered subsequent thereto specify the material which the appellants are required to use. The terms and conditions stipulated in the impugned proceedings required the appellants to obtain technical clearance for the structural design and specifications from the Chief Engineer, GHMC and the JNTU, Hyderabad. The specification, design of the board etc., were standardized and approved by the GHMC and the JNTU. There is no innovation in technology, let alone such technology being available exclusively with the appellants. That only 9 out of the 134 traffic junctions, i.e, only 6% of the traffic junctions, were entrusted to the appellants satisfies but one of the several requirements for a project to qualify as a "pilot project". The impugned proceedings, and the subsequent contracts entered into with the appellants, demonstrate a lack of innovation or exclusive expertise of the appellants in the installation of traffic signages and in erecting barricades and litter bins. It is not as if the appellants were the only agencies which had the technology or the wherewithal to install these equipments. It is evident, therefore, that the works assigned to the appellants on nomination basis were styled as "pilot projects" only to avoid having to take the tender process route.

18. In the BOT model of execution of projects, since the task of designing and building the facility, and to operate and to maintain them for a certain period, is entrusted to the private partner, it is essential for the Government/local authority to undertake a cost - benefit evaluation exercise in order to determine whether it is worthwhile entrusting the installations to the private partner, or it would be more beneficial to have the traffic signages, barricades and litter bins, installed on its own. No such evaluation exercise has been carried out by the GHMC before

entrusting these works to the appellants. It is incongruous that a "pilot project" should be entrusted for execution on a "BOT" basis. As noted herein above, a pilot project is more in the nature of a test or a trial run to demonstrate and evaluate the effectiveness of a full scale project or scheme. It is only with a view to ascertain whether such installations would be effective, and in order to enable the corporation to decide whether it should be extended to other traffic junctions in the city, are these works said to have been entrusted to the appellants. The BOT model envisages these installations being transferred by the appellants to the corporation at the end of the period of operation of eight/three years. It defies reason that the corporation should be saddled with an installation, at the end of the operation period, whose effectiveness and utility is uncertain, and to ascertain which the project has been entrusted to the appellants on a "pilot basis". Entrusting execution of "pilot projects" under the BOT model would not be in larger public interest. A BOT contract is inherently incapable of being regarded as a "pilot project".

19. Not only has award of contracts on nomination basis, except under exceptional circumstances, been faulted in the judicial pronouncements hereinabove referred to, not taking the tender route in this regard also contravenes the provisions of the Greater Hyderabad Municipal Corporation Act, 1955 (GHMC Act). Sections 124 to 129-A of the GHMC Act relate to "Contracts". Section 126 requires tenders to be invited for contracts involving an expenditure exceeding Rs. 5.00 lakhs. Under sub-section (1) the Commissioner shall, at least seven days before entering into any contract for the execution of any work which involve an expenditure exceeding Rs. 5.00 lakhs, give notice by advertisement in the local newspapers, inviting tenders for such contracts. Section 129-A relates to pre-qualification tenders to be invited for works costing Rs. 50.00 lakhs or more and, under Sub-section (1), in respect of any work the estimated cost of which is Rs. 50.00 lakhs or more the Commissioner shall give notice, by advertisement in the newspapers in the prescribed manner, inviting tenders or applications from persons who satisfy the pre-qualifications specified in such notice. The said provision confers power on the Government to appoint a committee for scrutiny and evaluation of pre-qualifications of the tenderers or applicants whose tenders or applications may be received in pursuance of the notice issued under sub-section (1), and to make its recommendations to the Commissioner as to the suitability or otherwise of the persons to whom tender schedules may be issued in respect of the works.

20. Installation of barricades, signages and litter bins would fall within the scope of a "contract for execution of a work". In a BOT model of execution of a work, the private collaborator first builds either a building or an infrastructure facility such as roads etc., or a system, then operates it for a certain duration during which it recoups the capital and revenue expenditure incurred by it along with reasonable return on investment, and then transfers the building, infrastructure facility or the installed system, to the public enterprise. These works, executed by the private collaboration, constitute "execution of works" attracting the

provisions of Section 126(1) and 129-A(1) of the GHMC Act. The statutory requirement of inviting tenders, both u/s 126(1) and 129-A(1) of the GHMC Act, is dependent on the expenditure involved in the execution of the works, and not the expenditure which the Corporation is required to incur. When power is given under a statute to do a certain thing in a certain way the thing must be done in that way or not at all. (Taylor v. Taylor (1875) Ch.D. 426). If a statute has conferred a power to do an act, and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the rule is that if this were not so, the statutory provision might as well not have been enacted. State of Uttar Pradesh Vs. Singhara Singh and Others, ; Dhanajaya Reddy v. State of Karnataka (2001) 4 SCC 9; Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, ; State of Gujarat Vs. Shantilal Mangaldas and Others, . Award of contracts to the appellants on nomination basis also falls foul of the statutory stipulations of Section 126(1) and 129-A(1) of the GHMC Act.

21. Under a Public-Private Partnership model for execution of works on a BOT basis the Government or the local authority, instead of executing the work on its own, may well find it beneficial to have the works executed by the private partner. Even where such a mode of executing the work through the private collaborator is adopted, it would be in furtherance of larger public interest if the Corporation were to ensure that its revenues are maximized, instead of conferring undue benefits on the private partner. u/s 373 of the GHMC Act all public streets within the city of Hyderabad vest in the Corporation, and are under the control of the Commissioner. Barricades, signages or litter bins can be installed and erected on public streets only with the approval of the Corporation for which the Corporation is entitled to charge, among others, ground rent. Where these barricades/signages carry advertisements, the Corporation is also entitled to collect advertisement fees. Resorting to the tender process route may well have enabled the Corporation to maximize its revenues both in terms of ground rent and advertisement fees. Having these works executed by nomination, more often than not, results in the private participant enriching itself at the cost of the public exchequer. It is evident from the correspondence between the appellants and the GHMC, during the period September to November, 2010, that the amount charged by the GHMC in terms of clause 8.2(b) of the agreement has been drastically reduced at the appellants' behest. That the Corporation readily agreed to reduce the amounts which it was entitled to receive, only goes to show that it evinced greater interest in lending a helping hand to the appellants, than to endeavour in maximizing its revenues.

22. In 5 M & T Consultants¹, on which reliance is placed by the Learned Senior Counsel, the project to be implemented by the Corporation was thought to be the first of its kind and, after an analysis and consideration of all the factors of the project for about a year, a decision was taken to undertake the work as a pilot project on an experimental basis. Permission was granted to the appellant for

erection of street signboards on certain terms and conditions. It is in this context that the Supreme Court held that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to malafide or improper exercise or improper use of power by the authority concerned; sufficient latitude should be left with the authorities to adopt their own techniques of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority, motivated by public interest as well, in undertaking such ventures; Section 124 enabled the Commissioner to undertake self financing schemes, to be implemented and maintained without financial commitment or expenditure to the Corporation; the provisions, relating to Sections 420/421, would have relevance only when any such installations is made for the benefit/utility of a private person, who executed it and not to a case wherein the installations were such which were to be normally made and maintained by the Corporation for the public good but, instead, was permitted to be made on its behalf, and at its behest, by a private party for the use and benefit of the public at large, which ultimately have to be left as the property of the Corporation only, and that too when executed on a self-financing basis; merely because, as an ultimate outcome in the long range, the appellant was able to make some more profit, than what was envisaged, could not render the exercise undertaken or the scheme executed vulnerable for being challenged to be either as one in improper/abuse of powers or by means of any reprehensible/condemnable conduct, calling for interference at the hands of a Court of law.

23. The phrase "traffic signages" has not been explained either in the proceedings or in the agreement. The names of streets, direction signages etc., were already displayed by the GHMC on the streets allotted to the third appellant, much before these contracts were awarded in their favour. Unlike, in 5 M&T Consultants¹, installation of traffic signages, barricades and litter bins is not the first of its kind even in the city of Hyderabad, let alone in the country. Both the appellants and the respondent corporation admit that traffic signages were subjected to open bids/auction under the "Fund Your City" initiative of the GHMC in the year 2006 under the public-private partnership model. No expertise or extraordinary skill is required for erection of pole litter bins, as it is just an ordinary pole fitted with a dust bin, and an advertisement board. The contracts, granted to the appellants, do not contain details of any specifications regarding the quality of the equipment, etc., namely the signages, barricades and litter bins which are to be installed under the BOT model. If the equipment is not of the minimum required standards and specifications they may not be functional subsequent to the period of the agreement which would compromise public interest. Reliance placed on 5 M&T Consultants¹ is, therefore, misplaced.

24. The Learned Senior Counsel, appearing on behalf of the appellants, is no doubt justified in his submission that, for a proposal to be accepted by the GHMC for execution, it is immaterial whether the project is conceived by the GHMC or a

proposal submitted to it is accepted. It must, however, be borne in mind that even in cases where such proposals are made either to the Government, or the local authority, by a private entrepreneur/innovator, there are fair, reasonable and transparent modes for the award of these contracts, instead of on "nomination basis", one such being the Swiss challenge method. A Swiss challenge is a form of public procurement in some jurisdictions which requires a public authority, which has received an unsolicited bid for a public project, to publish the bid and invite third parties to match or exceed it. The Swiss Challenge System is a new bidding process to encourage private sector initiative in core sector projects. It is an offer made by the original proponent to the government/local authority assuring his process to be the best (in terms of effectiveness including both the factors cost and time) by his initiative as a result of his own innovative approach. The Swiss challenge system allows third parties to make better offers (challenges) for a project during a designated period with the simple objective of discouraging frivolous projects, or to avoid exaggerated project development costs. The original proponent gets the right to counter-match any superior offer given by a third party.

25. In the Swiss Challenge method, on receipt of a suo motu proposal from a developer, tenders are invited by way of advertisement; the tenders received in response to the advertisement are compared with the proposal given by the developer; this method confers on the developer, who has given the original proposal, the opportunity or the first right of refusal; the original developer is required to match/raise his bid on par with/or more than the highest proposal tendered; the original proposer has the opportunity to take up the project on the highest offer; and, in the event he refuses, the highest bidder has the right to implement the project. If the original proposer exercises his right of first refusal, the project is then offered to the highest bidder. If the highest bidder refuses the offer the amount deposited by him can be forfeited. In the Swiss Challenge Method, there is no provision for allowing other tenderers to raise the bid further, when the "initiator of the proposal" agrees to raise his bid upto the highest bid. Under this method the originator of the proposal must, in consideration of his vision and his initiative, be given the benefit of matching the highest bid submitted. (Ravi Development¹²; Goldstone Exports Limited¹⁶). An unsolicited bid or a proposal received from a developer can thus be subjected to a bidding process by different modes including the Swiss challenge method.

26. In Ravi Development¹² the validity of the Swiss Challenge Method, adopted on a pilot basis, with respect to a proposal received from a private entrepreneur, (i.e. Ravi Development¹²), for development of undeveloped land, was under challenge. The Bombay High Court held that inviting public tenders for development of government lands, invoking the Swiss Challenge Method, was in order to confer preferential treatment to Ravi Development, and was arbitrary and illegal. In appeal the Supreme Court, after considering its earlier judgments including 5 M and T Consultants¹, held that the Swiss Challenge method applied by the State Government, only on a pilot basis, was transparent; the said

method was beneficial to the government as it did not lose revenue, and was getting the highest possible value; the State Government was well within its rights to try out, on a pilot basis, a methodology recognized internationally as well as in India; to make it effective, the Swiss Challenge Method or any other encouraging concept should be duly publicized first; and the effectiveness of public-private participation can only be ensured when private entities are aware of such a scheme; and rules and regulations were required to be followed in availing a new system, otherwise unfairness, arbitrariness or ambiguity may creep in. To avoid the ill-effects of a new system, in the form of the Swiss Challenge method, the Supreme Court made the following suggestions:- (1). the State/Authority should publish in advance the nature of the Swiss Challenge Method and particulars; (2). Publish the nature of projects that could come under such a method; (3). mention/notify the authorities to be approached with respect to the project plans; (4). mention/notify the various fields of the projects that could be considered under the method; (5). set rules regarding the time limits on the approval of the project, and respective bidding; (6). the rules to be followed after the project had been approved by the respective authorities; and (7). all persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture, and there should be healthy inter-se competition amongst such developers.

27. Installation of traffic signages, and erection of barricades and litter bins, have been styled as "pilot projects" (though they are not) only to avoid having to tread the tender process path, and to award the contracts to the appellants on nomination basis. A "pilot project" cannot be executed under the BOT model as it would contravene larger public interest. We are in complete agreement with the conclusion of the Learned Single Judge that these contracts, styled as "pilot projects", could not have been awarded on nomination basis and should, instead, have been subjected to the tender process.

II. WOULD THE ORDER IN W.P. NO. 11354 OF 2009 DATED 02.11.2009 BAR A CHALLENGE TO THE ACTION OF THE GHMC IN AWARDING WORKS TO THE APPELLANTS ON NOMINATION BASIS?

28. Sri D. Prakash Reddy, Learned Senior Counsel, would submit that the corporation had entered into agreements with the appellants after the earlier Writ Petition, (i.e., W.P. No. 11354 of 2009), was dismissed on 02.11.2009; and since the action of the GHMC, in awarding the very same works on nomination basis, was upheld by this Court in W.P. No. 11354 of 2009 dated 02.11.2009, the Learned Single Judge, by the judgment under appeal, had erred in upholding the challenge to the action of the GHMC.

29. In the judgment, now under appeal before us, the learned Single Judge distinguished the earlier order passed in W.P.No. 11354 of 2009 dated 02.11.2009, which related to the award of the very same works, holding that the petitioner therein was not aware of the manner in which the contracts were awarded to respondent Nos. 4 to 6 (appellants herein); the facts and figures

pertaining to the contract of installation of advertisement boards on road dividers were not certain; the Corporation did not place necessary material before this Court; taking into account the judgment of the Supreme Court in *5 M and T Consultants*¹, the Writ Petition was dismissed; neither was any principle of law laid down, nor any provision of the Act interpreted, and the facts pleaded therein were not clear, if not uncertain; the petitioners, in the instant case, had made a thorough verification of the facts, and had placed them before the Court; the Corporation had admitted to almost all the facts, but had tried to justify award of contracts for certain reasons; and, therefore, dismissal of W.P.No. 11354 of 2009 could not constitute a ground for rejection of the present Writ Petition.

30. It cannot be lost sight of that it is the internal working of the High Court which splits it into different "Benches", and yet the Court remains one. A letters patent appeal, as permitted under the letters patent, is normally an intra-Court appeal whereunder the Letters Patent Bench, sitting as a Court of correction, corrects its own orders in exercise of the same jurisdiction as was vested in the Single Bench. *Baddula Lakshmaiah and Others Vs. Sri Anjaneya Swami Temple and Others*, . The judgment under appeal cannot be faulted on the ground that an alternative view, which might commend itself to the appellate Court, has not been accepted. At least, such review is not open to an appellate Court hearing appeals against orders made under Article 226 of the Constitution which is a discretionary remedy. Interference can only be on an error of principle but not on re-evaluation of evidence nor on the basis of preferential choice of alternatives. (*Royal Laboratories v. Labour Court, Hyderabad* 1984 (2) ALT 207 (DB)). As we are in agreement with the view of the Learned Judge, expressed in the judgment now in appeal before us, challenge thereto, on the ground that a different view was taken in W.P.No. 11354 of 2009 dated 2.11.2009, does not merit acceptance.

III. WOULD FAILURE OF THE PETITIONER TO SUCCESSFULLY COMPETE IN THE "FUND YOUR CITY PROGRAMME" IN 2006 DISENTITLE THEM FROM QUESTIONING AWARD OF WORKS TO THE APPELLANTS ON NOMINATION BASIS?

31. Sri D. Prakash Reddy, Learned Senior Counsel, would contend that the appellants had specifically pleaded in their counter affidavit that an open bid auction was held on 23.12.2006 through Public - Private Partnership Model under the "Fund Your City programme" to get the best offer; the petitioner, along with several other outdoor media asset agencies, had participated in the auction proceedings, but did not find it lucrative; the petitioner was not amongst the first and second highest bidders; the first and the second highest bidders also failed to honour their commitment; as previous attempts to award similar works in the year 2006 was unsuccessful, the Corporation was justified in awarding the contract to the appellants on nomination basis; and this fact, though pleaded by respondent Nos. 4 to 6 (appellants herein) in the counter affidavit filed by them in the Writ proceedings, was not considered by the learned Single Judge.

32. To augment the resources of the GHMC, for creation of infrastructure facilities under the "FUND YOUR CITY" scheme in the Public Private Partnership (PPP)

model, certain works were put to auction on 23.12.2006, including Signage and advertisement boards. The location of the signage and advertisement board was on the Begumpet Fly-Over.

33. While highlighting the petitioners' participation in the auction for installation of traffic signages, under the "Fund Your City" scheme held on 23.12.2006, the appellants make no reference to their participation or otherwise in such auction proceedings and, if they did not, then how they would stand on a better footing than the petitioners. Be that as it may, the only location for installation of traffic signages, which was subjected to auction in December, 2006 under the "Fund your city" scheme, was on the Begumpet fly over which is not among the locations where the appellants are now required to install signages, barricades and litter bins. Contracts entered into for installation of these traffic signages, barricades and litter bins on nomination basis cannot, therefore, be justified on the ground that an earlier attempt to subject them to auction under the "Fund your city" scheme in December 2006 was not successful. The mere fact that this aspect has not been considered by the Learned Single Judge is of no consequence. Whether competitive bids would have been received for installation of traffic signages, barricades and litter bins at the present locations could only have been ascertained if bids had been invited, which the GHMC chose not to do. This contention, urged on behalf of the appellants, by the Learned Senior Counsel must also be rejected.

CONCLUSION:

34. None of the rare and exceptional circumstances, which would justify deviation from the tender process route and necessitate award of contracts on nomination basis, exist in the cases on hand. It is not as if there is a situation of grave urgency in installing the traffic signages or in erecting barricades and litter bins, or that the appellants have exclusive expertise in these areas, or that these works cannot be entrusted to any other agency, or even that the GHMC had repeatedly conducted auction or invited bids resulting in their being forced to take recourse to the "nomination" process. It is evident that recourse to the tender process was avoided only to benefit the appellants at whose instance the number of traffic signages, and the locations where they were required to be installed, were changed more than once and the amount payable by them to the GHMC, in terms of clause 8.2(b) of the agreement, was drastically reduced in stages. The subterfuge of a "pilot project", and a BOT model of execution of the works, is but a ruse to award these contracts to the appellants on nomination basis, instead of adopting the tender process route which would have maximised the revenues of the GHMC, but may well have denied the appellants the opportunity of enriching themselves at the cost of the public exchequer. This case is yet another illustration of the existing systemic malaise where private gain is accorded pride of place, and "public benefit" is largely ignored. A few more such instances may well necessitate a revisit on the standards of scrutiny to be adopted in the judicial review of award of contracts. Application of the strict

scrutiny test may be called for, instead of the present deferential scrutiny standards being adopted by Courts of law.

35. Viewed from any angle, the order of the Learned Single Judge does not necessitate interference under Clause 15 of the Letters Patent. All the three writ appeals fail and are, accordingly, dismissed. However, in the circumstances, without costs.