
(2012) 03 DEL CK 0022

In the Delhi High Court

Case No : Writ Petition (C) 5437 of 2011

M/s Well Protect Manpower Services Pvt. Ltd.

APPELLANT

Vs

MCD and Others

RESPONDENT

Date of Decision : 02-03-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 32

Citation : (2012) 2 BC 238 : (2012) 187 DLT 585

Hon'ble Judges : Sanjay Kishan Kaul, J;Rajiv Shakdher, J

Bench : Division Bench

Advocate : Sunil Mittal, Mr. D.K. Sharma, Mr. S.K. Vashishtha, Mr. D.K. Mittal, Mr. Pranav Rishi and Mr. Kshitij Mittal, for the Appellant; Maninder Acharya, Advocate for R-1 and R-2 and Mr. Rakesh Khanna, with Mr. Rajesh Gogna and Ms. Jyotika Kalra, Advocates for R-3, for the Respondent

Judgement

1. A public notice was issued on 13.06.2009 by R-1/MCD, inviting tenders from the reputed/specialized watch and ward agencies/contractors having capacity to provide required number of uniformed trained manpower for security services for the hospitals to protect its assets and to regulate public in OPD/Indoor etc. The petitioner claims that this was in breach of the Circular dated 09.05.2006 stipulating that all the tenders after 30.09.2006 would be processed only through the e-tendering process.

2. The tender floated had two stages - the technical bid and the price bid. It is only on qualifying the technical bid, was the price bid liable to be opened. The technical bids were opened on 15.07.2009 and four bidders qualified including the petitioner and R-3 (M/s Prehari Protection System Private Limited). The price bids were opened on 10.08.2009 and evaluated by the Price Evaluation Committee. On 24.08.2009, the MCD asked the technically qualified bidders to provide the complete bifurcation of the quoted price. The MCD on 11.09.2009 concluded that the price bid only of R-3 was valid and responsive. We may notice that it is the say of the petitioner that R-3 used forged and false documents for

qualifying the technical bid since the performance certificate stated to be issued by M/s NTPC Limited was forged and fabricated. The Price Evaluation Committee called R-3 for negotiation on 25.09.2009. There were complaints of irregularities including to the Central Vigilance Commission, but the tender was awarded to R-3 on 26.04.2010.

3. The petitioner claims that the Chief Vigilance Officer (?CVO? for short), MCD on the basis of the complaints received with regard to irregularities in awarding the contract to R-3 requested the Commissioner, MCD for initiating action against R-3 and further recommended to call for an explanation from all the members of the Technical Evaluation Committee (?TEC? for short) which was to be forwarded to the Vigilance Department along with relevant comments and the action taken report. In pursuance to the said decision dated 22.09.2010, reply was submitted by the Health Department, but the explanation of the TEC was found unsatisfactory by the CVO on 27.10.2010 and a recommendation was made for cancellation of the tender awarded to R-3 along with recommendation for suitable action against the Technical Evaluation Committee Members. It is the further claim of the petitioner that the MCD took a decision on 02.11.2010 for cancellation of the tender of R-3 and issued a show cause notice on 11.11.2010 to R-3.

4. The R-3 aggrieved by the action of the MCD preferred WP(C) No. 424/2011 claiming various reliefs but did not succeed and the learned Single Judge in terms of the order dated 24.01.2011 while disposing of the writ petition only fixed a time-bound schedule for a decision pursuant to the show cause notice after giving a personal hearing to R-3.

5. The petitioner has, thus, filed the present writ petition under Article 226 of the Constitution of India seeking quashing of the tender awarded on 26.04.2010 and a direction to the respondents to call the petitioner for re-negotiations and award of contract.

6. On the first date of hearing on 01.08.2011, learned counsel for the petitioner made a three-fold submission:

i. The recommendation of the Chief Vigilance Officer, MCD for cancellation of the tender awarded to respondent No. 3 on the Performance Certificate issued by NTPC Limited having been found forged has not been acted upon and thus respondent No. 3 continues to work the tender.

ii. If respondent No. 3 has obtained the tender through a forged Performance Certificate, the said respondent cannot count the time period spent towards working the tender in question as part of experience.

iii. On cancellation, the tender should be awarded to the petitioner.

7. The order after recording the aforesaid three submissions, further proceeds to record that the counsel for the petitioner fairly stated that out of the three pleas, the last one was not being pressed by him as the tender was only for a period of

2 years and it was open to the MCD to invite fresh tenders. The writ petition is naturally contested by the respondents who have filed their counter affidavits.

8. In the course of hearing, on 13.10.2011, it transpired that R-2/Additional Director (Health), MCD, had got verified the Performance Certificate issued by the NTPC, which as per the CVO, MCD had been found to be forged, and the NTPC had given a response stating that R-3 had actually carried out the work. These documents had not been placed on record. In fact, the MCD pleaded that even if the certificate issued by NTPC is not taken into account, the R-3 met the requirements as per the tender conditions. We, thus, called upon R-2 to file an affidavit in this behalf.

9. Learned counsel for the petitioner drew our attention to the notings dated 22.09.2010 of the CVO of the MCD. The notings show that a detailed inquiry on the allegations made in the complaints was carried out and it was found that R-3 did not fulfil the eligibility conditions mentioned in Clause 2 r/w Clause 8.2.5 of the Tender Form. The financial bid was found not to be signed by all the members of the Tender Opening Committee, the check list of technical bid was left blank by the agency and was also not signed by members of TEC and the experience certificates furnished by the firms were also not verified by the members of the TEC before awarding the work. A further aspect of the complaints was that R-3 was not deploying Ex-servicemen as per the terms and conditions of the contract requiring employment of at least 33% of manpower from the category of Ex-servicemen i.e. it was alleged that only 6 of the 107 employees of R-3 were Ex-servicemen. The action was, thus, proposed against R-3.

10. The second noting dated 27.10.2010 referred to the explanation given by the TEC and the CVO, MCD came to the conclusion that the interpretation of the clauses by the TEC while evaluating the bids was not correct. On most other matters also, the finding has been adverse including regarding experience certificate. Having found the explanation given by the TEC as unsatisfactory, a recommendation was made that the tender awarded to R-3 may be cancelled and a fresh tender be called for. A suitable action against the TEC members was suggested.

11. Learned counsel for the petitioner fairly conceded that the tender invited was for a period of two years and the said period would come to an end in April, 2012 and, thus, no purpose would be served by terminating the contract awarded to R-3. He, however, submitted that if his plea is correct that R-3 was awarded the tender, though it was not qualified, then at least R-3 should not be permitted to use the experience of having executed the tender in question for purposes of obtaining any fresh tender from any party. In a nutshell, the plea raised was that providing of services under the contract in question should not give experience benefit to R-3 and that could be the effective relief.

12. Learned counsel for the petitioner vehemently contended that the present

case is one of interference by the political wing of the MCD to support the illegality of the award of the contract to R-3 despite the said respondent not being eligible. In this behalf, learned counsel drew our attention to a report filed along with the counter affidavit of R-1 and R-2 (Annexure R-7). This report is of a committee of five members constituted by the Hon''ble Mayor of MCD comprising of a Chairman (Chairman of MRPH Committee), three members (councilors of MCD) and Additional Commissioner, IT as the convenor, to decide the case of continuance/cancellation of contract awarded to R-3 in the wake of "Commissioner"s" recommendation to cancel the contract based on the report of the Vigilance Department of the MCD. The committee in para 4 of the report noted that it should assess the entire matter holistically keeping public interest, patient care and credibility of the MCD uppermost in its mind while making its recommendations rather than analyzing it with the perspective of legal complexities.

13. We must observe that we fail to appreciate as to how the legal parameters in an award of contract could have been given a go-by to preserve the credibility of the MCD. The Committee found that defects pointed out by the Vigilance Department, even if they existed, could not have been detected by any reasonable person or they are too insignificant observations which would not be material to disqualify R-3 technically. Para 5 of the report contains the operative portion, which reads as under:

5. Having regard to the facts and circumstances, the Committee has concluded:-

- a) That, there was inherently no problem with the tender process ? there was wide publicity and enough competition;
- b) That, the TEC and PEC have followed transparent and fair procedures in their decisions as would appear to a rational and reasonable observer;
- c) That, the objections raised by the Vigilance Department are tenuous and pedantic, which they themselves could not detect or point out before awarding the contract in spite of their having had access to the full documents;
- d) That, the abrupt cancellation of the contract would not be in the interest of the MCD nor in the interest of citizens of Delhi especially in view of the performance of the firm, which has been found to be quite satisfactory to the user health units.

The Committee therefore is of the considered view that the cancellation of the contract, at this juncture, on the grounds raised by the Vigilance Department is not cancelled for and recommends continuation of the contract as per the agreement signed between the Municipal Corporation of Delhi and the firm.

14. We may, however, notice that the submission of learned counsel for R-1 and R-2 is that the said respondents have not been influenced by the said report of the political wing, but the matter had been examined by the Additional Commissioner (Health) as per the order 29.03.2011, which has received the

imprimatur of the Commissioner, MCD. A copy of this order has also been annexed to the counter affidavit of R-1 and R-2. The order notes that the show cause notice dated 11.11.2010 issued to R-3 was on two grounds: Firstly, the criteria laid down under Clause 2 r/w Clause 8.2.5 of the Tender Form had not been fulfilled and Secondly, the condition No. 43 of the terms and conditions of the contract requiring employment of at least 33% manpower from the category of Ex-servicemen was also not fulfilled. Insofar as the second issue is concerned, it was admitted by R-3 that for a certain period of time this condition had been breached but that was on account of scarcity of Ex-servicemen due to Commonwealth Games.

15. The other important aspect noticed is that the petitioner himself had filed WP (C) No. 2329/2010 aggrieved by its financial bid being declined as non responsive, which was dismissed on 09.04.2010 with costs of Rs. 20,000/- to be paid to R-3. The SLP preferred by the petitioner being SLP(Civil) No. 11677/2010 was also dismissed on 26.04.2010 only reducing the costs from Rs. 20,000/- to Rs. 5,000/-. The Additional Commissioner (Health) as per its order dated 29.03.2011 found that the condition with regard to deployment of 33% of Ex-servicemen had been fulfilled and that said issue did not affect the eligibility criteria for the award of the tender. The list of Ex-servicemen along with their deployment at various hospitals and poly-clinics had been submitted and no complaint/objection had been received from any health institutions in this regard. However, the question of compliance of Clause 2 read with Clause 8.2.5 of the Tender Form was examined and it was found that while Clause 2.2 provided the 'eligibility criteria?', Clause 8.2.5 only provided for the 'documents to be submitted by the bidder'. These two clauses were held to be independent and thus if the contracting agency met the requirement of Clause 2 during any preceding period, then it could be reasonably concluded that the conditions of the tender had been complied with whereas the purpose of Clause 8.2.5 was to ensure that the bidder had been providing similar kind of services for at least five consecutive years i.e. in support of Clause 2.1 of the Tender Form and not in relation to Clause 2.2. Even if, Clause 8.2.5 was subject to Clause 2.2, it was found on a perusal of the record produced that R-3 had complied with the requirement of Clause 2 and Clause 8.2.5 of the Tender Form at the time of the award of the tender. R-3 had submitted an affidavit declaring that all the contents of the experience certificate were genuine and there was no reason to doubt the same. In a nutshell, R-1 and R-2 contended that on re-visiting the issue, it was found that R-3 had complied with the tender conditions. This plea is, of course, supported by R-3. We may notice that in view of the limited plea sought to be advanced by the petitioner that the experience gained by R-3 from the contract in question should not enure for the benefit of R-3, R-1 and R-2 had no objection to the same as the contract would stand executed by April, 2012, but they defended their decision which concluded that R-3 was not ineligible. R-3 was not willing to concede to its ineligibility. Thus, the question of eligibility/ineligibility of R-3 is required to be gone into.

16. In order to appreciate the relevant terms and conditions, we consider it necessary to reproduce both Clause 2 and Clause 8.2.5 of the Tender Form, which are as under:

2. ELIGIBLE BIDDERS:-

2.1 All security agencies who are providing similar kind of services for at least last five consecutive years and having annual average turnover of Rs. 100 Lac (30% of the estimated value of the contract) during the last three financial years in the books of accounts and being run by the ExServicemen/Ex-Para-military men or reputed firms.

2.2 The bidder should have the experience of competition of similar works in any of the Departments/Autonomous Institutions/ Universities/ Public Sector Undertakings of the Government of India or Government of NCT of Delhi or any other State Government or Public Sector Banks or Local Bodies/Municipalities as follows:

- a) Three similar completed works costing not less than amount equal to 30% of the estimated cost; or
- b) Two similar completed works costing not less than the amount equal to 50% of the estimated cost.

8.2 Documents Comprising the bid (to be Submitted in Technical Envelope)

.....

.....

8.2.5 The bidder shall furnish the details regarding total number of works, as stated in Clause A.2.2.(a) (b) and (c), completed in preceding five years, which were similar in nature and complexity as in the present contract requiring supply of trained man power to provide Security Services.

(Note: It is agreed that in Clause 8.2.5, the reference to Clause A and (c) is by mistake as there is no such clause)

17. If we scrutinize the aforesaid clauses, it emerges that there are three stipulations in Clause 2.1 forming part of the eligibility conditions: Firstly, the security agency should have provided similar kind of services for at least last five consecutive years; Secondly, the security agency should have annual average turnover of Rs. 100 lac (30% of the estimated value of the contract) during the last three financial years in the books of accounts and Thirdly, the security agency should be run by ExServicemen/Ex-Para-military men or reputed firms.

18. The Clause 2.2 provides for experience of completion of similar works in Government Departments, Autonomous Institutions, etc. We may notice that the expression used in Clause 2.1 (First Part) is 'similar kind of services' while

Clause 2.2 refers to 'similar works' i.e. the expressions are more or less identical. The experience of completion of similar works requires either of the criteria to be complied with: Three similar completed works, each costing not less than the amount equal to 30% of the estimated cost (which in the present case would be three contracts of Rs. 1.05 crores each) or Two similar completed works, each costing not less than the amount equal to 50% of the estimated cost (which in the present case would be Rs. 1.75 crores per work).

19. Clause 8.2.5 requires the bidders to furnish details regarding total number of works as stated in Clause 2.2(a)(b) completed in five years which were similar in nature and complexity as in the present contract requiring supply of trained manpower to provide security services.

20. The interpretation sought to be adopted by the Additional Commissioner (Health) and as canvassed by the respondents is that though the first part of Clause 2.1 requires experience of similar kind of services for at least last five consecutive years, Clause 2.2 requires completed works of requisite value which does not provide for any time limit i.e. the experience required as per Clause 2.2 has no co-relation with the time period of five years stipulated in Clause 2.1. To support this plea, the Additional Commissioner (Health) held that Clause 8.2.5, where once again the reference was to the period of 5 years, provides for documents to be furnished and has to be read de hors Clause 2. We find such an interpretation completely unacceptable. It is crystal clear that Clause 2.1 (First Part) requires past experience of similar kind of services with reference to last five consecutive years. The financial turnover condition for the last three financial years of Rs. 100 lakhs is Second Part of Clause 2.1. Clause 2.2 refers to Institutions where such experience as per Clause 2.1 (First Part) had to be obtained, qua similar works, gives two alternatives to satisfy the condition of such past experience i.e. three works of Rs. 1.05 crores each or two works of Rs. 1.75 crore each. This is naturally in the last five consecutive years which is further made clear by Clause 8.2.5 which refers to the documents to be submitted as per Clause 2.2(a)(b) for the last preceding five years. It could hardly be the intent of the drafters of the contract that the similar experience gained decades ago of the requisite value as per Clause 2.2 would satisfy the requirement of the First Part of Clause 2.1. This is a completely stretched interpretation sought to be given by the Additional Commissioner (Health).

21. We cannot but notice the complete turnaround in the stand of the respondents over the passage of time. The Chief Vigilance Officer of the MCD having found various infirmities in the award of the contract to R-3, required a show cause notice to be issued. That such infirmity prima facie existed is apparent from the fact that the Commissioner, MCD gave his imprimatur to the issuance of such a show cause notice. This was interceded in between by the decision of the political wing of the MCD to constitute its own committee which apparently sought to influence the scrutiny of the award of the tender to R-3. The infirmities in the award of the tender to R-3 were sought to be explained

away in the report of the Committee by using the adjectives such as 'tenuous', 'pedantic' 'assess the entire matter holistically keeping public interest' apart from issues of 'patient care' and 'credibility of the MCD uppermost in its mind' rather than 'analyzing it with the perspective of legal complexities'. This approach is completely fallacious and a cover-up operation to give credibility to the award of the contract to R-3 by seeking to ignore the legal principles by calling them 'legal complexities'. The object is clear that the MCD having awarded the tender to R-3, despite infirmities found, must not backtrack. The endeavour of the Additional Commissioner (Health) in its order is also towards this objective by seeking to give a tenuous interpretation to Clause 2 and Clause 8.2.5. We are, thus, clearly of the view that the interpretation of the contract sought to be given by the respondents is completely unacceptable and the current interpretation is as set out hereinabove.

22. Now coming to the alternative conclusion contained in the order of the Additional Commissioner (Health) that even if Clause 2.1, Clause 2.2 and Clause 8.2.5 are read together, R-3 had complied with the requirements. Such a conclusion is based on the consideration of the work experience of R-3 as discussed in the additional affidavit of R-1 and R-2 affirmed on 14.11.2011. The work experience certificate submitted by R-3 has been discussed in para 4 of the affidavit which reads as under:

S. No. NAME OF INSTITUTION PERIOD OF WORK VALUE OF WORK

1. M/s Punjab State Cooperative Supply and Marketing Federation Ltd., Chandigarh. "Markfed" i) 01.04.2002 to 23.02.2006 ii) 01.11.1998 for one year Approximately Rs. 21,00,000/- lacs per month i.e. Rs. 9,66,00,000/- is the approximate value of the completed work Rs. 18,00,000/- per month i.e.

2. NTPC Talcher, Thermal Power Station, Angul, Orissa. 01.10.2003 to 30.09.2005 Rs. 1,05,08,196/-

3. M/s Hafed, Haryana, Kaithal Unit, Panipat Unit i) 10.10.2006 to 31.10.2008 ii) 2006 to 2009 Total Rs. 74,50,000/-Rs. 62,26,719/ Rs. 1,36,76,719/-

4. Post Graduate Institute of Medical Research, Chandigarh 01.10.1999 to 30.04.2002 Approx. Rs. 5,30,000/- per month i.e. Rs. 1,59,00,000/-approx.

5. AIIMS, New Delhi 01.01.2009 for one year Rs. 4,00,00,000/-

6. Safderjung Hospital, New Delhi 01.06.2009 for one year Rs. 9,00,000/-

7. NTPC Anta 07.02.2004 to 06.02.2005 Rs. 17,68,130/-

8. Ludhiana Distt. Co-op Milk Producers UnionLtd., Verka 15.12.2008 to 14.12.2009

23. It is the submission of learned counsel for R-1 and R-2 that the first three contracts have been taken into consideration for purposes of work experience of R-3 where the test as per Clause 2.2 (a) has been applied of completed work of

Rs. 1.05 crore each. If the experience of the last five years is taken into account, the relevant period would be 01.06.2004 to 31.05.2009 as confessed by learned counsel for the respondents. The tender at serial No. 8 has no figures mentioned, the tender at serial Nos. 6 & 7 are below the bench mark of Rs. 1.05 crore per tender and tender at serial No. 4 was granted and executed much prior to this period. Even otherwise, these tenders have not been taken into account in the own wisdom of R-1 and R-2 for determining the experience as canvassed by learned counsel for R-1 and R-2. The first tender was awarded much prior to the relevant period though a part of it was executed during the period of 5 years. The position is the same qua the second tender. The argument of learned counsel for R-1 and R-2 is that it is the date of the completion of the tender which would be relevant i.e. as long as the tender is completed within a period of 5 years, the past experience, irrespective of the period of that tender falling prior to the stipulated period of five years, is to be counted. This, in our considered view, is completely unacceptable. In fact, the tender ought to have commenced and completed within a period of five years. We may notice that these are not tenders for erection or supply of material, but for providing services as security agency. Even if the beneficial interpretation is given, the proportionate value of the tender(s) completed within the last five years is taken into account; the value of the work for the first tender would be about Rs. 5.04 crores, the value of the work for the second tender would be Rs. 65 lakhs and value of the work of the third tender would be Rs. 1.36 crores. The benchmark qua the three tenders is Rs. 1.05 crores in the present case and the second tender falls below that value. The test is, thus, not satisfied. If the alternative test of two tenders of Rs. 1.75 crores is applied, then the second and third tenders fall outside this value and only the first tender would fall within the value and, thus, once again the parameter is not met.

24. We have gone into these details only to show that in whatever manner the calculations are made, R-3 does not meet the requirements of the tender insofar as the past experience is concerned and thus ought not to have been awarded the tender.

25. Learned counsel for the petitioner has also referred to the other documents filed with the affidavit of R-1 and R-2 affirmed on 14.11.2011 which include the information sought by R-1 and R-2 from NTPC qua the work experience of R-3. The information sent by NTPC shows that the contractor had committed violation of the labour rules and after deducting the provident fund of the workers and adding the contribution of the employer, the same had not been got deposited in the provident fund account. It has also been mentioned that the entity which worked with NTPC Limited was M/s Prahari Security Services & Detective Services Pvt. Ltd. The tender qua MCD was applied for by M/s Prahari Protection System Private Limited (R-3 herein). This fact has been pointed out only to show the non-performance of R-3 which conducts business under different names, but in our view, this does not affect the principal controversy i.e. whether R-3 meets the requirements of the tender.

26. Another aspect pointed out by learned counsel for the petitioner is that the information sought under RTI from NTPC Limited where query was raised whether M/s Prahari Security Services & Detective Services Pvt. Ltd was awarded the security services contract with effect from 01.09.2006 and the number of security guards engaged per day, the answer to this is 'no'. In respect of the date of termination, it was informed that the date of termination was 06.04.2006. It was, thus, submitted that a wrong information had been furnished by R-3. The aforesaid has been explained by learned counsel for R-1 and R-2 as the information was sought qua specific period while the period taken into account, in our considered view (erroneously), is prior to that. We may notice that the petitioner had proceeded on the basis that as per clause 2.2, three similar completed works or two similar completed works of requisite turnover had to be executed in the last three financial years based on the second parameter of clause 2.1 providing for an annual average turnover of Rs. 100 lakhs during the last three financial years. However, as we have observed aforesaid, the correct interpretation of the tender is that the past experience of last five consecutive years is to be taken into account as per the first requirement of Clause 2.1 and, thus, the requisite three or two completed works has to be with reference to this five years period for which documents had to be submitted as per Clause 8.2.5 also for the last preceding five years.

27. We are, thus, of the unequivocal view that R-3 did not meet the tender conditions qua the past experience. We may add that though due credence must be given to interpretation of a tender as envisaged by the drafters of the tender, the endeavour in the present case, is to interpret the tender conditions tenuously to somehow justify the action of R-3 being awarded the tender despite the earlier prima facie conclusions to the contrary only as a cover-up operation. Thus, the interpretation sought to be given to the tender is completely contrary to the very terms of the tender.

28. Learned counsel for R-3, towards the end of the arguments, sought to raise an objection about the maintainability of the petition on the principles of constructive res judicata by relying on the Constitution Bench Judgment of the Supreme Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, . In this behalf, a reference was made to para 35, the relevant portion of which reads as under:

It is well established that the principles of res judicata are applicable to writ petitions. The relief prayed for on behalf of the petitioner in the present case is the same as he would have, in the event of his success, obtained in the earlier writ petition before the High Court. The petitioner in reply contended that since the special "leave petition before this Court was dismissed in limine without giving any reason, the order cannot be relied upon for a plea of res judicata. The answer is that it is not the order of this Court dismissing the SLP which is being relied upon; the plea of res judicata has been pressed on the basis of the High Court's judgment which became final after the dismissal of the special leave

petition. In similar situation a Constitution Bench of this Court in *Daryao and Others Vs. The State of U.P. and Others*,), held that where the High Court dismisses a writ petition under article 226 of the Constitution after hearing the matter on the merits, a subsequent petition in the Supreme Court under Article 32 on the same facts and for the same reliefs filed by the same parties will be barred by the general principle of *res judicata*. The binding character of judgments of courts of competent jurisdiction is in essence a part of the rule of law on which the administration of justice, so much emphasised by the Constitution, is founded and a judgment of the High Court under article 226 passed after a hearing on the merits must bind the parties till set aside in appeal as provided by the Constitution and cannot be permitted to be circumvented by a petition under Article 32. An attempted change in the form of the petition or the grounds cannot be allowed to defeat the plea as was observed at page 595 (of SCR) (at p.1467 of AIR) of the reported judgment, thus:

We are satisfied that a change in the form of attack against the impugned statute would make no difference to the true legal position that the writ petition in the High Court and the present writ petition are directed against the same statute and the grounds raised by the petitioner in that behalf are substantially the same.

The decision in *Forward Construction Co. and Others Vs. Prabhat Mandal (Regd.)*, *Andheri and Others*,), further clarified the position by holding that an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive *res judicata* underlying Explanation IV of s. 11 of the CPC was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of *res judicata*.

29. The aforesaid principle is sought to be applied to the facts of the present case on the ground that the writ petition filed by the petitioner earlier being WP(C) No. 2329/2010 was dismissed on 09.04.2010. It was pleaded that if there were any other pleas available to the petitioner, they should have been raised in that petition and not by filing the present writ petition.

30. We are unable to accept the aforesaid plea as the contours of the controversy in that writ petition and in the present writ petition are completely different. The WP (C) No. 2329/2010 was concerned with the challenge laid by the petitioner to his financial bid being declared as non-responsive. The subject matter of the present writ petition arises from the ineligibility of R-3. The order passed by the concerned authorities of R-1 and R-2 on the basis of which the award of tender to R-3 is sought to be justified are much post the decision in that writ petition. As noticed, the show cause notice issued to R-3 was unsuccessfully challenged by R-3 in WP (C) No. 424/2011, decided on 24.01.2011.

31. As long as R-1 and R-2 were proceeding against the award of tender to R-3 on account of prima facie view of its ineligibility, the process was on and the petitioner was entitled to wait for that process to end. This process only ended with the order of the Additional Commissioner (Health) dated 29.03.2011 which is stated to have received the imprimatur of the Commissioner, MCD. Thus, the principles of res judicata or constructive res judicata do not bar the present writ petition.

RELIEF

32. We are of the considered view that the limited relief prayed for by the petitioner in the present case ought to be granted i.e. without the tender awarded in favour of R-3 being cancelled, as the same is stated to be coming to an end in April, 2012, R-3 is held disentitled to use the experience gained by execution of the contract in the form of past experience for any future tenders and thus R-1 and R-2 will not issue any certificate of past experience to R-3 based on the contract in question.

33. The writ petition is accordingly allowed with costs of Rs. 5,000/- each against R-1 & R-2 and R-3 respectively.