
(2009) 03 BOM CK 0069

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2584 of 2008 and Writ Petition No. 135 of 2009

Sahakar Agencies Pvt. Ltd.

APPELLANT

Vs

Maharashtra State Road Development Corporation and MEP
Toll Road Pvt. Ltd.
 MEP Toll Road Pvt. Ltd. Vs The
State of Maharashtra and Sahakar Agencies Pvt. Ltd.

RESPONDENT

Date of Decision : 17-03-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 21

Citation : (2009) 4 BomCR 757 : (2009) 111 BOMLR 1547

Hon'ble Judges : Swatanter Kumar, C.J.;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : R.R. Dhawan, J. Reis and Swati Deshmukh, instructed by V.J. Hegde, in Writ Petition L No. 2584 of 2008, Mukul Rohatgi, F.E. D''Vitre, V.R. Dhond and Deepak Chitnis, instructed by D.C.C. and Associates in Writ Petition No. 135 of 2009, for the Appellant; Mukul Rohatgi, F.E. D''Vitre, V.R. Dhond and Deepak Chitnis, instructed by D.C.C. and Associates for Respondent No. 2 in Writ Petition (L) No. 2584 of 2008, R.M. Kadam, Advocate-General, Public Prosecutor Chavan, instructed by R.J. Nathani, for the Respondent

Judgement

Swatanter Kumar, C.J.

Factual matrix of the cases

1. The Petitioners in Writ Petition (Lodging) No. 2584 of 2008, namely, M/s Sahakar Agencies Pvt. Ltd., a Company duly registered under the provisions of the Indian Companies Act, claim to be carrying on the business of management of Octroi collection stations and Toll stations and other similar facilities and activities at public places. Respondent No. 1, Maharashtra State Road Development Corporation (hereinafter referred to as "Corporation"), a Government of Maharashtra undertaking, issued a notice of invitation for tenders in the form of `Offer Document' in the month of October 2008, thereby inviting tenders for management and collection of Tolls at the five Toll Stations at

different entry points to Mumbai City, which were detailed as under:

- (i) Vashi on the Sion Panvel Highway;
- (ii) Airoli Bridge;
- (iii) Mulund on the Eastern Express Highway;
- (iv) Mulund/Thane (West) on LBS Marg and
- (v) Dahisar on the Western Express Highway

The contract was for a period of 26 weeks commencing from the date of contemplated award of the contract on or about the end of the first week of November 2008.

2. It is averred that these five Toll Stations provide the only motorable points of entry to the City of Mumbai and the State of Maharashtra had been collecting toll from the vehicles passing through these toll stations at different pre-determined rates for different category of vehicles through the contractors in the past. These contractors are normally selected on the basis of the bids/tenders called for periodically. Present notice of inviting tenders contemplated the contract to be awarded for a period of 26 weeks on monthly upfront payment basis. The offer notice contained all the information with draft agreement and general instructions for the bidders who wish to participate in the tender process. It is the claim of the Petitioners that they were eligible and satisfy the prescribed criteria. Besides they had adequate experience of toll collection as for the five entry/exit Toll Stations at Nagpur they were awarded contracts on behalf of the State of Maharashtra since 2008. The important Clauses of the eligibility criteria, as mentioned in the tender documents, read as under :

1. Net Worth : Rs. 1320.00 Lacs in any one of last three years.

2. Annual Turnover : Shall not be less than Rs. 4401.00 lacs at March 2008 price level in a year from toll operations & shall not be less than rupees 8802.00 lacs (at March 2008 price level) in year from annual turnover from all operation (including toll) business in any of the last three financial years as on 31st March 2008 (10% rise per year will be applied on costs of previous year to bring the values to March 2008 level).

3. Experience :

One year of toll collection experience of Minimum 16 - toll lane contract under one contract.

3. As already noticed, according to the Petitioners, they fully satisfy the eligibility criteria and had done various works of collection of Octroi for different cities, namely, Bhiwandi Nizampur City Municipal Corporation from 6th October 2004 to 5th October 2005 and for the Aurangabad Municipal Corporation from 1st March 2005 to 29th February 2008 and they were issued certificates of successful completion of the contracts by the concerned authorities on 1st November 2008

and 16th May 2008 respectively in relation to octroi collection contracts.

4. Earlier the Petitioners had submitted their tender documents and their bid was received by the Corporation and the Petitioners, were ultimately adjudged the successful bidder, for the management of the Toll station at Nagpur. Vide their letter dated 2nd April 2008 the Petitioners had submitted a query as to whether the experience of collection of the octroi would be considered as a valid experience in toll collection work. The Corporation had replied to the said query vide its letter dated 5th April 2008 that experience of octroi collection work of Municipal Nakas shall be considered valid as experience in toll collection/user fee works. As the Petitioners heavily relies on this letter, it will be useful to refer to this letter at this stage itself :

Maharashtra State Road Development Corpn. Ltd. (A Government of India Undertaking) No. MSRDC/19/JMD/TMU/17 Date : 05.04.2008

To Sahakar Agencies Pvt. Ltd. 8/8, Dayabhai Compound, S V Road Malad (West), Mumbai 400 064.

Sub. : Experience of Octroi collection.

Adverting to above subject, it is to inform you that experience of Octroi collection work of Municipal Nakas shall be considered valid as experience in toll collection./user fee works.

This letter is issued as per your request.

Sd/- Executive Engineer (TMU) MSRDC (Ltd.), Mumbai.

5. The Petitioners were awarded the Nagpur Toll contract on 11th April 2008. It is the specific case of the Petitioners that in furtherance to the letter dated 5th April 2008, after clubbing the experience of collection of octroi, the Petitioners were awarded the contract for collection toll at the five entry points in the city of Nagpur for the first time in 2008 by the Corporation.

6. The contract for management of five toll stations at Mumbai entry points was being managed by M/s Ideal Road Builders since 2002 without any break. This contract was extended in an arbitrary manner twice without inviting any public bid. In view of the judgment delivered by this Court on 16th August 2007 in Writ Petition No. 580 of 2007 (Subhash R. Acharya Vs. State of Maharashtra and Others,), the Corporation could not grant any further ad hoc extension to that Company and out of compulsion had to invite tenders. But still during the tender process and with the intention to help that Company, on 1st November 2008 letter was issued by the Corporation in complete variance to the stand taken in their letter dated 5th April 2008 to say that octroi collection will not be treated as valid experience for subjected work of toll contract. This letter reads as under :

Maharashtra State Road Development Corpn. Ltd. (A Government of Maharashtra Undertaking) No. MSRDC/19/JMD/TMU/104/2008/1437 Date : 01.11.2008

To MEP Toll Private Ltd. IRB Complex Chandivali Farm, Chandivali Village Mumbai 400 072.

Sub. : Appointment of Contractor for collection of toll at five toll stations for Mumbai Entry Points :

1. At Vashi on Sion-Panvel Highway
2. At Mulund on Lal Bahadur Shastri Marg
3. At Mulund on Eastern Express Highway
4. At Airoli bridge on Airoli-Mulund Road
5. At Dahisar on Western Express Highway

Ref. : Your letter No. MEP/OUT/884 dt. 24.10.2008. With reference to above subject, it is to clarify that work experience of Octroi collection will not be treated as valid experience for subjected work of toll contract.

Sd/- Executive Engineer (TMU) MSRDC (Ltd.), Mumbai.

OC Approved by competent authority Copy for information to concerned contractors who have purchased bid document for above subjected work.

7. The last date for submission of the tender was on or before 1300 hours on 4th November 2008. The bid envelopes were to be opened on 4th November 2008. It is the allegation of the Petitioners that just near to this date, this letter dated 1st November 2008 was issued calculatively and mala fidely to introduce frivolous and unsustainable objection in order to eliminate other bidders and to favour the private Respondent No. 2. This was being done in a manner so as to render it difficult, if not impossible, for the affected parties to take even recourse to judicial remedy. The Petitioners were qualified for the tender and as per the practice followed and adopted in the letter dated 5th April 2008, their octroi experience was to be counted for computing toll experience. The restriction sought to be imposed by letter dated 1st November 2008 was to eliminate fair competition. In fact, the pre-qualification criteria had not been clearly stated in the offer document and was being altered in an arbitrary manner and in violation of the Office Memorandum of Central Vigilance Commission dated 17th December 2002.

8. Feeling aggrieved from the issuance of the letter dated 1st November 2008 and consequential exclusion of the Petitioners on that technical ground, the Petitioners lodged the present Writ Petition on 3rd November 2008 without any delay praying that the direction contained in the letter dated 1st November 2008 be set aside and the Respondent Corporation be directed to consider the Petitioners as eligible and its bid be accordingly considered by the Corporation.

9. This Writ Petition was contested by the Corporation, which stated that the entire tender process followed and observed by the Corporation was in accordance with law and not in violation of the terms and conditions of the said

tender offer. The tender notice dated 8th October 2008 which related to the collection of toll at five entry points for Mumbai city clearly provide that the tenderer must have an experience of one year of toll collection of minimum 16 toll lane under one contract. It was also the condition that the annual turnover from toll operation shall be minimum Rs. 4401.01 lacs. As these conditions were not satisfied, the Petitioners could not have been awarded the tender. Furthermore, the Petitioners had not impleaded the other tenderer i.e. MEP Toll Road Pvt. Ltd and therefore prayed that the Petition is liable to be dismissed. MEP Toll Road Pvt. Ltd. had taken out a Notice of Motion bearing No. 549 of 2008 and was joined as party Respondents by order of this Court dated 12th December 2008.

10. It is the case of private Respondents that, after opening of the envelopes, vide letter dated 19th November 2008 the Respondent Corporation had informed the private Respondent that the offer quoted by them was highest amongst the other eligible offerers. Private Respondents attended the office of the Superintending Engineer on 20th November 2008 and submitted a letter dated 20th November 2008 giving their justification of the said offer of Rs. 78.30 crores and keeping in view the well set and time effective toll collecting mechanism and considering the private Respondent's long term relationship with the Corporation, the private Respondent agreed to increase their offer and offered Rs. 82.08 crores for six months by reducing their profit margin and also agreed that if the private Respondent's contract was extended for a period of six months, the said Respondent would give a upward revision upto Rs. 88 crores. The Petitioners had not satisfied the criteria of experience under the terms and conditions of the tender; they did not have the turnover of Rs. 44.01 crores and were defaulters in payment of installments in respect of contract for collection of tolls awarded by Respondent Corporation at Nagpur Toll Stations and they had no expertise. Resultantly, their financial bid was not considered justifying non consideration of octroi experience for the tender in question. It was stated that the experience at Nagpur is totally different than that for Mumbai. Octroi needs expertise in collection of taxes, whereas toll needs knowledge of equipment for speedy clearance of traffic and this experience is not interchangeable.

11. As already noticed, vide order dated 12th December 2008, the Notice of Motion for intervention of the Applicant was allowed and was ordered to be added as Respondent No. 2. The Bench dealing with the matter at the relevant time by a detailed order dated 12th December 2008 considered the case of the Petitioners and while making certain prima facie observations, passed the following directions :

10. We are concerned with governmental largesse. The respondents themselves as late as June, 2008, had considered octroi experience for toll collection in favour of the Petitioner at Aurangabad. In fact letter issued by respondents to the Petitioner dated 5.4.2008 was in response to the Petitioners contention that the respondents were to award several other contracts in future and whether the

Petitioner would be eligible based on his experience of octroi collection. Respondents replied that experience of octroi collection will be considered as valid for toll collection/user fee.

11. Even at the pre bid meeting nobody was informed that the experience of octroi collection would not be considered. For the first time on 1.11.2008 when the EMD had to be deposited was the communication forwarded amongst others to the Petitioner that his experience as octroi collection cannot be considered as experience for toll/user fees. In our opinion the law now is well settled. In M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , the Supreme Court has clearly spelt out the terms and conditions cannot be changed midway or the rules of the game altered so that some of the persons who had bid based on the tender conditions as understood by the respondents themselves are disqualified. What is more important to note is that the bids received will be considered while formulating the policy for awarding bids in future as can be seen from the record.

12. We are clearly of the opinion that once respondents had accepted octroi experience as valid for toll collection, it was not possible after tenders had been invited to hold that octroi collection cannot be considered for the purpose of experience. The respondents acted illegally in treating the Petitioners bid as non responsive. It is not disputed that if the octroi experience is considered then the Petitioner has the necessary experience. The difference in bid between the Petitioner and the intervener is nearly Rs. 25 Crores and that too for only 26 weeks. Respondents are therefore, directed to consider the Petitioners bid as responsive. In the light of the above, there will be interim relief in terms of Prayer Clause (b). Respondent waives service.

12. This order was assailed by the Corporation before the Supreme Court which disposed of the Civil Appeal vide its order dated 19th December 2008. The Supreme Court without entering into detailed analysis of the contention raised, disposed of the SLP with a direction that this Court would take up the matter for hearing and in relation to the steps already taken by Respondent Corporation, had passed the following directions :

It is brought to our notice that on 18.12.2008 some steps have been taken by the authorities. No further steps shall be taken to implement the decision stated to have been taken on 18.12.2008. We make it clear that by giving this protection, we have not expressed any opinion on the merits of the case.

The appeal is disposed of accordingly.

13. As noticed in the order of the Supreme Court, the Corporation vide its letter dated 18th December 2008 had awarded the work to the Petitioners but kept the execution of the contract in abeyance. The Petitioners had given a bid of Rs. 112.6 crores. The Respondent Corporation accepted the request of private Respondents to grant extension of the contract period on higher valuation at varied conditions. Thus, according to the Corporation, they have even protected

the public interest by requiring the private Respondents to make payments at the rate of Rs. 88 crores and to furnish a bank guarantee for differential amount of Rs. 112.6 crores and Rs. 82.35 crores plus interest at 24% per annum on the differential amount and the bank guarantee has also been extended. Normally, the Writ Petition would have come to an end by issuance of the letter dated 18th December 2008 but for the observations stated to have been made by the Supreme Court in its order dated 19th December 2008 due to which the Respondent Corporation kept the said contract in abeyance and extended the period of contract of private Respondent. During the course of hearing, vide our order dated 23rd January 2009, we had also asked the Corporation to make its stand clear as to whether it wishes to abide by the conditions of the letter dated 18th December 2008 or it wishes to continue the extension of contract with private Respondents. Surprisingly, the Corporation vide its affidavit dated 30th January 2009 took the stand that the Petitioners are ineligible as it does not possess the requisite experience and as such they do not propose to give effect to the letter dated 18th December 2008 and they would continue with the contract with private Respondents at the higher rate for the remaining period of the contract. Keeping in view this fact, the Petitioners prayed for disposal of the Writ Petition on merits and expeditiously.

14. At this stage, we may also notice that the private Respondents, namely, MEP Toll Road Pvt. Ltd., also lodged on 12th January 2009 another Writ Petition being Writ Petition No. 135 of 2009 against the State of Maharashtra and the Petitioners in Writ Petition (Lodging) No. 2584 of 2008 challenging the letter of intent/ acceptance of bid in terms of the letter dated 18th December 2008.

This Writ Petition was also heard along with Writ Petition (Lodging) No. 2584 of 2008.

Discussion on merits of the contentions raised

15. The contention raised on behalf of the Petitioners that the tender document dated 8th October 2008 prescribes criteria of toll collection/user fee experience for 16 lane toll ways and as per practice of Respondent Corporation, the expertise of collecting octroi should be counted as valid as was counted as relevant in respect of the contract of similar nature at Nagpur in 2008 and even at Aurangabad, Nanded, Kini and Tasawade even from the year 2005 upto the year 2008. Similarly experience of octroi and toll was clubbed for the purpose of determining total eligibility criteria. This being the practice and as informed by the letter dated 5th April 2008 issued by Respondent Corporation, both the experience have to be clubbed and as such the Petitioners were eligible and the issuance of the letter dated 1st November 2008 declaring that octroi experience was not valid was arbitrary and issued in colourable exercise of power. As per the terms and conditions of the tender document indicated in the tenders, the turnover of the bidder shall not be less than Rs. 4401.00 lakhs at March 2008 and the experience of toll collection works has to be for one year of minimum 16 toll lanes under one contract. Clause 2.4.1 refers to the minimum annual turn

over while Clause 2.4.2 refers to networth of the offerer. Clause 2.4.3 states, "the intending bidder shall have minimum experience of toll collection/user fee as given at Sr. No. 16 on page 80 of Volume II of offer document". Clause 16 has already been referred by us.

16. It is a settled norm of such commercial transactions that the period indicated in the tender is subject to satisfaction of such terms and conditions indicated in the tender and upon conditions as may be considered appropriate. These terms and conditions can validly be clarified and in given case had even been specified much before the material and relevant dates for submission of tender documents and opening of envelopes of tender so that none of the bidders suffer prejudice on that count. According to the Respondents, the work in five Municipal Nakas at Mumbai city is a much specialized work and different than the work at Nagpur, Aurangabad and for that matter other places in the State. The toll experience thus is a specialized experience and experience of octroi collection cannot be clubbed for considering eligibility of an offerer in accordance with Clause 16. In fact, they have stated that octroi needs experience in valuation of goods whereas toll needs knowledge of equipments for faster clearance of traffic. Toll as understood in law is a tax for consumption and bringing goods in an area leviable on entry of goods. Toll is controlled by Entry 59 of List II of Schedule VII of the Constitution of India and as claimed by the Respondents is intended to be a charge for maintaining speed of traffic. Thus, octroi and toll are the terms of distinct and different meaning and consequences.

17. Clause 16 of the contract does not, in our opinion, admit any ambiguity. Clause 16 (at page 80 of Volume 2) has to be read in conjunction with Clause 2.4.3 and their cumulative reading does not in any way makes it mandatory that the expression experience of "toll collection" has to be read interchangeably or is synonymous to the expression "octroi collection". They are terms well known and accepted in their respective fields and it is not for this Court to introduce a definition or interpretation of these words so that both would be understood to be inclusive of each other for the purposes of determining experience in terms of the eligibility clause. This matter was in fact put at rest by the letter of the Corporation dated 1st November 2008 where they have explicitly stated that 'octroi experience' would not be counted or added to the toll experience for the purposes of determining the eligibility of an offerer. This clarification had been issued prior to the last date for submission of tenders as the tenders were to be opened on 4th November 2008.

18. The emphasis is led by the Petitioners on the letter dated 5th April 2008 to contend that it was a practice to add octroi experience to toll experience for the purposes of considering the eligibility criteria both in relation to experience as well as annual turnover. Firstly, it is not clear from the letter dated 5th April 2008 as to in what context and how the said letter came to be issued. The context of the letter is not clear and it related to which tender and which contract is also not evident from the letter. Of course, the letters appears to have been issued by the

Executive Engineer of the Corporation to the Petitioners stating that experience of octroi collection, work of Municipal Nakas will be considered valid experience in toll collection/user fee work. This letter is stated to have been issued at the request of the Petitioners. We are unable to see as to what extent this letter can be relied upon for upholding the contention raised by the Petitioners. In any case, at that time present contract in question was not even in existence and tenders for the work in question had not been even invited. This letter certainly does not reflect a policy decision of the Corporation which need to be taken at an appropriate level. Furthermore, what terms and conditions are controlling the award of the contracts at Nagpur or Aurangabad may not necessarily be applicable at Mumbai. The authorities can always provide different terms and conditions in the offer inviting tender for contract depending upon the nature of the work. This discretion of the authorities indicating the tender can hardly be questioned before the Court of law as it is for those authorities who are specialized bodies in their respective fields to determine the terms and conditions that should be postulated by such authorities while entering into the realm of contractual obligations. The Court would be reluctant to interfere in such discretion of the authorities unless and until the same was violative of fundamental right or protection or were ex facie so arbitrary as to indicate judicial chastisement. We have already noticed that the authorities had fully clarified their stand vide letter dated 1st November 2008 on the subject and made their stand absolutely clear. Undue emphasis on the issuance of the letter dated 5th April 2008, in our opinion, would neither be just nor fair particularly in light of the fact that as far as this letter was issued in furtherance to the letter of the Petitioners dated 2nd April 2008 wherein they had stated that they were the successful bidders for Nagpur and Letter of Acceptance for the same had been issued and necessary formalities were pending with the Corporation. In that background, they had made a general statement that number of tenders had been floated for toll collection and in some of them the Petitioners were also interested and they requested the concerned Officer/Executive Engineer to certify whether octroi experience would be considered by the Corporation. This was addressed to the Executive Engineer of Toll Monitoring Unit of the Corporation who had written the letter dated 5th April 2008. It is also clarified that in relation to the tender document in respect of Aurangabad-Nanded for the year 2008 as well as Kini-Tasawade, similar condition was there and the Respondent Corporation in the pre-bid meeting issued clarification/replies to the various queries raised by different tender parties and a decision was specifically taken in those cases that the experience of collection of octroi of Municipal Nakas will be considered as valid for toll Nakas in those areas. In other words, these decisions had been taken on case basis. A conscious decision had been taken by the authorities to vary the conditions before the relevant time. It is not for us to examine the merit or otherwise of the decisions taken by the Corporation in those cases as they are neither directly nor indirectly subject matter of dispute before us. It is nobody's case that the Corporation was not competent to take such a decision. However, the attack is primarily on the ground of colourable

exercise of power. As far as the allegation of action being arbitrary and there is colourable exercise of power to benefit the private Respondent is concerned, we shall discuss the same in subsequent part of the judgment. Suffice it to note that the policy decision taken by the Corporation is that they have not varied the eligibility criteria in regard to experience and annual turnover specified in the existing conditions read in conjunction with the letter of clarification dated 1st November 2008 and, therefore, the Petitioners were found to be ineligible.

19. It was also argued that the word 'toll collection/user fee' used in Clause 2.4.3 is capable of liberal construction. In fact, there is ambiguity resulting from the use of the word 'toll experience' in Clause 16 on the one hand and the expression 'toll collection/user fee' appearing in Clause 2.4.3 and thus it was reasonable enough keeping in view the past practice of the Corporation to include octroi collection experience as part of the toll collection experience. Relying upon the judgment of the Supreme Court in the case of Printers (Mysore) Ltd. and Another Vs. Asstt. Commercial Tax Officer and Others, , it was argued that contextual meaning should be given to these words as there was nothing in the terms and conditions of the tender document to exclude expression octrio. It is possible that where context does not permit or where the context requires otherwise, the meaning assigned to a word may be applied with a variation. But in the present case, we see no occasion to expand the word 'toll collection' to include 'octroi collection' by implication particularly in face of the stand taken by the Respondent Corporation. There is no material on record before us to show that the letter dated 1st November 2008 is liable to be quashed and is opposed to past practice adopted by the Corporation. As far as city of Mumbai is concerned, no such past practice has either been pleaded nor argued. The terms and conditions in relation to five entry points at Mumbai are clear and in any case prior to the opening of the tenders, the clarification vide letter dated 1st November 2008 had put the entire controversy in that regard, at rest.

20. Referring to the facts of the present case and in particular to the past practice, the Petitioners invoked the principle of 'legitimate expectation' claiming their entitlement to receive the letter to be declared as the successful bidder. The doctrine of legitimate expectation has been judicially recognized by the Courts and it operates in the domain of public law and in appropriate case constitutes substantive and enforceable right. The law in relation to legitimate expectancy has been explained by the Supreme Court in the case of Punjab Communications Ltd. Vs. Union of India and Others, , where it has been held as under :

37. The above survey of cases shows that the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way. The judgment in Raghunathan case requires that reliance must have been placed on the said representation and

the representee must have thereby suffered detriment.

21. The doctrine of legitimate expectancy is founded on bona fide exercise of authority by the authorities and the decision of the authorities while being free from the vice of arbitrariness, in a given situation be taken up as a substantive plea by an applicant who may justifiably raise the grievance if entitled to receive the benefit of the privilege as was being done in the past. Reliance was placed in this regard in the case of *M.P. Oil Extraction and Another Vs. State of M.P. and Others*, .

22. In the present case, there is no representation or past practice of the Corporation in relation to city of Mumbai which could lawfully give rise to the legitimate expectation of the Petitioners for claiming octroi experience as toll experience. There was no policy statement made in that regard more so in face of the letter dated 1st November 2008 which reiterated the existing policy of the Respondent Corporation. Such policy statement cannot be discarded unfairly or even applied selectively. Unfairness in the form of unreasonableness is akin and violative to the principles of natural justice. The application of the doctrine of legitimate expectancy in contra-distinction to the principles of promissory estoppel can only be invoked where it is based on sanction of law and when it is so declared. Legitimate expectation is not anticipation of an individual on the basis as to what he expects. [Reference in this regard can be made to (i) *National Buildings Construction Corporation Vs. S. Raghunathan and Others*, , (ii) *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer and Others*, and (iii) *Jitendra Kumar and Others Vs. State of Haryana and Another*,].

23. Thus, we have no hesitation in coming to the conclusion that the Petitioners cannot invoke the doctrine of legitimate expectation in the facts of the present case. Whether the action of the Respondent Corporation is arbitrary and is in colourable exercise of power and is in public interest ?

24. We have already noticed the facts in detail. However, the relevant facts to this controversy need to be noticed again. The five entry points tender for Mumbai was floated on 8th October 2008 as the contract with the private Respondents was coming to an end on 30th November 2008. After the issuance of the letter dated 1st November 2008, the Petitioners had filed the present Writ Petition (Lodging) No. 2584 of 2008 wherein the Division Bench of this Court on 3rd November 2008 had permitted the Respondent Corporation to open the envelopes on 4th November 2008, the date fixed, but not to award the contract finally. Then the Court passed the order dated 12th December 2008 and the field presently was covered by the order of the Supreme Court dated 19th December 2008. There is no doubt to the fact that the Petitioners were the highest bidder and had given a bid of Rs. 112.06 crores for the contract period of 26 weeks. As the Petitioners were found to be ineligible, the contract was to be awarded to the next highest bidder. The beneficiary of this was the private Respondents in whose favour the contract was extended with some modifications. After opening of the envelopes of the bidders on 4th November 2008, the Corporation had informed

the private Respondents MEP Toll Road Pvt. Ltd. vide their letter dated 19th November 2008 that they were considered the highest amongst the offers of eligible bidders and they should attend the office of the Corporation on 20th November 2008 for negotiations with respect to upward revision of the offer. Vide letter dated 20th November 2008, the private Respondents admitted that their offer was Rs. 78.30 crores for a period of six months from the date of authorization to collect toll. In that letter, the private Respondents expressed the difficulties of global recession and melt down in economy which had affected the traffic in the commercial capital and the over heads for shorter period are higher than a contract relating to larger period and keeping in view the interest rates but referring to the fact that they were existing operators having well set and time effective toll collecting mechanism and considering the relation with the Corporation, they agreed to increase the offer to Rs. 82.08 crores for six months by reducing their profit margins. They have also indicated in the said letter that if the extension was given beyond six months for another period of six months, they would give upward revision to Rs. 88 crores for the next six months. Another letter was written by the private Respondents on 21st November 2008 informing their willingness to enhance the offer for six months to Rs. 82.35 crores and asking for issuance of letter of acceptance.

25. The Corporation faced with the bid given by the Petitioners for Rs. 112.06 crores, considered the matter again. The order of the Division Bench of this Court dated 12th December 2008 had only directed the Respondent Corporation to consider the Petitioners' bid as responsive and to take decision. There was no mandatory direction issued by the Court requiring the Corporation to award the tender to the Petitioners. Even the order dated 12th December 2008 was challenged by the parties before the Supreme Court and despite the fact that the matter was pending before the High Court, vide letter dated 18th December 2008 the Corporation informed that the offer of the Petitioners had been accepted pursuant to the order of the Court. This offer was accepted for the period being 26 weeks. The Supreme Court while disposing of the SLP before it, had observed that no further steps be taken by the parties after issuance of the letter dated 18th December 2008. Thus, the acceptance given to the Petitioners was not implemented and the Corporation vide its letter dated 28th December 2008 informed the private Respondents that as per contract Condition No. 24 and at the rate of payment based on Rs. 112.06 crores for 26 weeks as discussed with that party, they were to continue toll collection from 29th December 2008 with upward upfront payment subject to the conditions stated therein. It was also stipulated in this letter that in the event of default, the contract for the extended period is liable to be terminated. This letter was duly received and vide letter dated 29th December 2008, the private Respondents informed the Corporation about the challenge before the Supreme Court and also that keeping in view their highest bid and increase by them voluntarily to Rs. 82.35 crores for 26 weeks, they should be called upon to pay that amount only and they were willing to offer the differential amount for week of Rs. 5 crores for

four weeks in the form of bank guarantee for a period of three months which may be extended further. This letter was allegedly considered by the authorities and it was alleged that the same was placed before the Board of Directors of the Corporation. It is stated that the Board empowered the Vice Chairman and the Managing Director to take a decision subject to final statement and issuance of necessary orders recorded on 6th January 2009 which reflects that the Board of Directors in the meeting held on 5th January 2009 had taken a decision that if there is no decision of the Court within four weeks, then the period may be extended and bank guarantee may be accepted. Vide letter dated 16th January 2009, the contract was extended for a period of six weeks subject to the condition stated in the letter requiring the private Respondents to make payment of weekly upfront amount of Rs. 3,16,73,077/- in cash and balance by furnishing bank guarantee including the interest. Strangely, vide their letter dated 29th January 2009, the private Respondents wrote to the Corporation criticizing the offer made by the Petitioners but at the same time said "Taking into consideration our social and moral responsibility towards them and to maintain our longstanding relationship, inspite of bearing heavy financial losses, we are ready to pay Rs. 113.40 crores for a period of 26 weeks" and prayed for acceptance of their bid. Another letter dated 16th December 2008 has been produced by the Corporation alleged to have been written by one Konark Infrastructure Ltd., who were also one of the bidders and who claimed to have paid a sum of Rs. 4.40 crores as EMD. Referring to the matter that octroi would be counted as an experience for toll collection as well, they could not quote the bid in view of the letter dated 1st November 2008 and since they have now completed the experience and satisfy the eligibility criteria prayed that their bid should also be considered.

26. In light of these facts, let us consider the question of prime importance in this case i.e. public importance. The private Respondents were awarded a contract in the year 2002 and have managed to continue till date on one pretext or the other. It is not in dispute that right from 2002 to the date of calling for the tender in October 2008, new tenders were not invited. This aspect, besides being opposed to public policy, is in complete contradiction to exposition of law by the Supreme Court as well as this Court. A Division Bench of this Court in the case of Subhash R Acharya (*supra*) while dealing with tender relating to management of three toll naka points in Goregaon (East), Mumbai, had clearly condemned the practice of grant of extension to the contract without inviting tenders and had mandated that the Government/ Competent authority should invite tenders for distribution of such State largesse. The Court held as under :

16. The power of the public authorities are, therefore, essentially different from those of private persons. A private person may deal with his properties and rights the way he feels proper, even if to others it may appear *ex facie* arbitrary. Such relaxation is not available to a public authority much less the Government. The Government must exercise its discretion fairly and within the specified limitations. The rules of business of the Government would control its functioning

and the persons in high position have to ensure all reasonable care and caution that no loss is caused to the affairs of the Government particularly in terms of money. So far as the rules of business are not offending the statutory Rules, they would be binding and enforceable. Though a Minister would have powers to take decisions in regard to his Department but if such a decision is taken contrary to the rules of business or is patently arbitrary, the same may not bind the Government....

17. While dealing with the aspect of distribution of State largesse or contractual obligations of the State, the principles of public trust and public accountability have to be applied in judicial determination. The State authorities should exercise discretion in awarding contracts but such discretion should be fair and in public interest. They should be free of arbitrariness and nowhere should amount to misfeasance in public office. In the case of Shivsagar Tiwari Vs. Union of India (UOI) and Others, , the Supreme Court while setting aside the discretionary allotments made by the Minister of Urban Development to his employees, relatives, etc. even directed that this amounted to misuse of duty and awarded exemplary damages as actionable in tort.

27. After enunciating these principles, the Court not only quashed and set aside the order dated 21st August 2004 granting extension in favour of a private party, the same being vitiated in law but also directed the State to invite fresh tenders in that case requiring the State to recover loss caused to public exchequer. The Court also directed as under :

(iv) In view of the established canons of public administration and decisions of Courts, clearly defining the field of judicial intervention in such matters and with an intention that a greater public purpose and interest is served and to avoid such arbitrary reoccurrence in the matters of State contracts, we consider it proper to issue direction to the State to ensure that no such extension of contracts is granted by its various Departments and instrumentalities in future. However, where it is found necessary in the wisdom of the Competent Authorities to grant such extension, it shall be extended for valid reasons alone, that too to be recorded in writing and after due consultation with concerned Department as also in accordance with Rules of Business, instructions issued by the Government, and in strict adherence to the prescribed procedure.

28. The above directions would stare the State in face while granting extension of contract to the private Respondent on an earlier occasion as well as presently in the case in hand. The effort of the Corporation has been to over-reach the judicial pronouncements one way or the other by adopting a course or methodology which is not in consonance with law. It is obligatory upon Corporation to state the conditions contained in the offer document unambiguously and clearly and give opportunity to all eligible parties to fairly participate in the tender process and then to award the tender to the higher bidder considering the interest of the Corporation and the public at large. All these aspects seems to have lost sight of by the Corporation. Firstly, the

confusion was caused by the Executive Engineer of the Corporation by issuing the letter dated 5th April 2008. Of course, as already noticed, in what context and for what purpose the same was issued is again a matter left to the imagination of the concerned parties. Why the clarification dated 1st November 2008 was not issued earlier and why the sister concern of the private Respondents needed that clarification is not again clear from the record. Another most important aspect of public interest involved in the present case is relating to the financial aspect. The last extension given to the private Respondents was obviously for quite low consideration for the period which was to end on 30th November 2008. The bids received in response to the invitation for tenders of October 2008 was for Rs. 112.06 crores for 26 weeks. Despite this high figure, the Corporation chose to grant extension to the private Respondents at a sum of Rs. 72 crores, which later on was increased to Rs. 88 crores. Strangely vide letter dated 29th January 2009, the private Respondents itself offered a bid of Rs. 113.40 crores against its own final offer of Rs. 88 crores that too for the extended period of six months beyond the currency of the present tender. The private Respondents also in its correspondence, as afore-referred, informed the Corporation that they were reducing their profits to give that high bid. Viewed from any commercial principles, the rate of profit thus would be anything between Rs. 72 crores and Rs. 113 crores and according to the Petitioners they still would make profits after giving a bid of Rs. 112.06 crores for 26 weeks. Viewed from any angle, it seems that the Corporation is being put to great financial loss and consequently the public interest has suffered a lot. The ad hoc decisions taken by the Corporation are again without any proper reasoning. The Corporation earlier had called upon the private Respondents to make weekly upfront payments at the rate of Rs. 112.06 crores but later on agreed to accept payment at the rate of Rs. 88 crores with a bank guarantee. In other words, the Corporation was quite willing to accept what was being offered by the private Respondents. This is not expected of a public undertaking. Such huge financial difference in the bidding is a sufficient indicator of improper policy and decision by the Corporation. Not only the decision making process but even the decision of the Corporation has undermined the larger public interest.

29. Colourable exercise of power and arbitrariness in State again are two sides of the same coin. Colourable exercise of power in given facts and circumstances of a case could itself be an arbitrary action, while arbitrary action is an expression of wide connotation and take in its ambit various aspects which include lack good faith, favouritism, violation of fundamental protections and decisions opposed to public policy. The matter was pending before the Supreme Court and there was hardly any justification for the Corporation to issue the letter dated 18th December 2008 particularly when the matter itself was fixed before the Supreme Court on 19th December 2008 and once the said letter was issued in an undue haste, then why was it not implemented, is a question worth consideration. After issuing the letter dated 18th December 2008 in favour of the Petitioners i.e. the highest bidder (Rs. 112.06 crores as opposed to Rs. 72 crores given by the

private Respondents), still the Corporation chose not to give effect to the letter and tried to cover up the matter by giving some nominal increase by extending the period of contract to the private Respondents may be because the Supreme Court had directed the parties not to take any further steps on the basis of the letter dated 18th December 2008 as it had directed hearing of the matter finally and left all questions open. Still the stand of the Corporation to withdraw the letter dated 18th December 2008 is a decision which we may not term as arbitrary as it was probably founded on the question of ineligibility.

30. The public law principles controlling the administrative actions of the public authorities are well settled. Right from the case of *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Supreme Court stated that standard of eligibility laid down in the notice of tender cannot be departed from arbitrarily as such departure from the standard will amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore did not submit their tender. The Supreme Court also held that relaxation of the standard of eligibility at the time of considering tender will amount to denial of opportunity to those who considered themselves ineligible.

31. Similarly, in the case of *Tata Cellular Vs. Union of India*, the Supreme Court defined the scope of judicial review in such matters and held as under :

94. The principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us

as the correct principles.

32. In the case of West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, , the Supreme Court said that relaxation by the State or its agencies of a rule or condition in favour of a particular bidder is not permissible as rule or instruction must be complied with scrupulously in order to avoid discrimination and arbitrariness.

33. In the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , the Supreme Court stated that involvement of public interest is a matter which should receive attention of the Courts while dealing with a Petition even in case of Government contract.

34. The law is equally well enunciated as far as exercise of discretion by the Government or its instrumentalities is concerned. Such discretion is a kind of latitude or liberty accorded by statute or rules. The Supreme Court in the case of Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, , held as under :

31. The word "discretion" standing single and unsupported by circumstances signifies exercise of judgment, skill or wisdom as distinguished from folly, unthinking or haste; evidently therefore a discretion cannot be arbitrary but must be a result of judicial thinking. The word in itself implies vigilant circumspection and care, therefore, where the legislature concedes discretion it also imposes a heavy responsibility.

35. Evidently, therefore, discretion cannot be arbitrary but must be result of judicious thinking with an element of transparency in the administrative procedure.

36. Mark Foley while referring to the definition of `transparency" stated that, "a Government operates and acts differently than a company. So all we want to do is get some transparency here and then determine if the deal should go forward".

37. The concept of discretion in Government action is further supported by the fact that some leverage has to be provided to the authorities concerned to take decision by considering the cumulative effect of the facts of a given case.

38. The Supreme Court in the case of Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, , while dealing with concept of equality in relation to Government contract introduced doctrine of level playing field and observed as under :

36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes

"opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in *I.R. Coelho (Dead) By LRs. Vs. State of Tamil Nadu and Others*, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

39. The present case can be examined in light of these principles. Firstly, we have already held that the action of the Respondent Corporation is not in the public interest. Secondly, it equally defeats the concept of reasonableness and proper application of mind. The Corporation has acted contrary to law and the circumstances appearing from the record produced before us show a definite tilt in the mind of the Corporation favourable to private Respondents. The Corporation should ensure that it offers fair competition to all eligible parties within the stated terms and conditions. Default in terms thereof would be termed as colourable exercise of power. The letters issued by the Corporation should be in conformity with its declared policy and every effort should be made not to cause any confusion. The Corporation must not represent to the bidders matters of policy in a manner which is likely to give rise to ambiguity or uncertainty. It is also not clear from the record as to why other eligible applicants nearly five who were the lower bidders to the private Respondents were not called for negotiations if the Corporation had taken a decision to negotiate awarding of the contract for upward revision. None of them were even informed of the date of negotiation i.e. 20th November 2008. This aspect of the matter certainly does

not satisfy the test of good faith in the action of the Corporation.

40. In the case of *S. Pratap Singh Vs. The State of Punjab*, , the Supreme Court held as under :

8. Doubtless, he who seeks to invalidate or nullify any act or order must establish the charge of bad faith, an abuse or a misuse by Government of its powers. While the indirect motive or purpose, or bad faith or personal ill-will is not to be held established except on clear proof thereof, it is obviously difficult to establish the state of a man's mind, for that is what the appellant has to establish in this case, though this may sometimes be done (See *Edgington v. Fitzmaurice* (1884) 29 Ch D 459). The difficulty is not lessened when one has to establish that a person in the position of a minister apparently acting in the legitimate exercise of power has, in fact, been acting *mala fide* in the sense of pursuing an illegitimate aim. We must, however, demur to the suggestion that, *mala fide* in the sense of improper motive should be established only by direct evidence that is that it must be discernible from the order impugned or must be shown from the notings in the file which preceded the order. If bad faith would vitiate the order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved facts.

41. Lack of good faith, therefore, can even vitiate an action on the part of the State or its instrumentalities. The steps taken by the Corporation right from October 2008 till 29th January 2009 sufficiently indicate the intent of the Corporation to extend operation of the existing contract or even award contract for future on the terms which were offered by the private Respondents in the name of good relations with the Corporation. The Corporation is expected to work in the larger public interest and ensure that its commercial decisions are taken after due thinking and examining the policy of the Corporation. The Corporation was ready to award the contract to the private Respondents for 26 weeks for a total sum of Rs. 72 crores in face of an offer received by it of Rs. 112.06 crores which itself was still given a further rise by the private Respondents to Rs. 113.40 crores. This could have shown the Corporation that there is amiss somewhere and it is required to remedy the same at the earliest. There is not even a thought in the mind of Officers of the Corporation as to why it could not consider the option of inviting the fresh tender in larger public interest.

42. Another aspect which is relatable to the letter written by M/s Konark Infrastructure Pvt. Ltd. is that number of parties have been denied the opportunity to contest the tender in question due to lack of clarity in eligibility criteria. As per the law laid down in *Ramana Dayaram Shetty (supra)*, eligible and proper tenderers/bidders should not be excluded by creating ambiguous conditions.

43. We are not oblivious to the circumstances prevailing in such commercial fields that some persons jump into the transaction at a later stage only to raise

an issue and stall proceedings. Thus, we are not attaching undue importance to this aspect but surely it is a matter which should have invited the attention of the Corporation at the relevant time.

44. Thus, we find that the entire decision making process in inviting, considering and finalising the tenders for the work in question is arbitrary, in colourable exercise of power and is opposed to public interest.

45. Thus, we make the following order :

(a) The entire tender process invited by the offer document dated 8th October 2008 and the proposal of the Corporation to extend contract of private Respondents i.e. MEP Toll Road Private Ltd, and even to continue with it under the old terms and conditions is untenable, unjustifiable and is hereby quashed.

(b) The Corporation is directed to invite fresh tenders for five Toll Nakas of Mumbai city in consonance with the stated position of law, while unambiguously stating the terms and conditions for inviting the tender in question which should be finalised within three weeks from the date of passing of this Order;

(c) The private Respondents shall be called upon by the Corporation to make all payments upfront week in accordance with law and at the rate of Rs. 112.06 crores for the entire period during which the present Writ Petition was pending and inclusive of the three weeks period given by us above.

46. Both the Writ Petitions are accordingly disposed of with the above directions leaving the parties to bear their own costs.