
(2022) 04 DEL CK 0204

In the Delhi High Court

Case No : Civil Writ Petition No. 6454 Of 2022, Civil Miscellaneous Application
No. 19522, 19523 Of 2022

Sanjay Yadav

APPELLANT

Vs

North Delhi Municipal Corporation

RESPONDENT

Date of Decision : 29-04-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2022) 04 DEL CK 0204

Hon'ble Judges : Manoj Kumar Ohri, J

Bench : Single Bench

Advocate : Ajay Verma, Amitesh Gaurav, Mini Pushkarna, Khushboo, Latika, Shikha

Final Decision : Dismissed

Judgement

Manoj Kumar Ohri, J

1. By way of the present petition filed under Article 226 of the Constitution of India, the petitioner seeks the following reliefs:-

"i. Call for the records relating to the Truck Parking Site at Timarpur, New Delhi;

ii. Allow the captioned Petition by issuing an appropriate writ, order or direction in the nature of writ of certiorari quashing/setting aside the Impugned corrigendum/addendum No. 1 dated 11th April 2022, issued vide letter No. DC/RPCell/NDMC/2022/D-44;

iii. Allow the captioned Petition by issuing an appropriate writ, order or direction in the nature of writ of certiorari quashing/setting aside the Impugned letter No. DC/RPCell/NorthDMC/2022/D-74 dated 18th April, 2022;

iv. Allow the captioned Petition by issuing an appropriate writ, order or direction in the nature of a writ of mandamus directing Respondent to continue the license already been granted to the Petitioner and to execute the required license

agreement in favour of the Petitioner for the area measuring 5005 sqm at the proportionately reduced monthly license fee and grant adjustment or refund of the excess amount deposited by Petitioner.”

2. The facts as emerge from the record are that while the petitioner has claimed himself to be a parking contractor, the respondent is North Delhi Municipal Corporation, which is stated to have issued a notice inviting e-tender No. 197 (NIT) on 09.10.2020 for licensing of various parking sites falling under its jurisdiction on payment of advance Monthly License Fee basis (hereinafter, referred to as 'MLF'). The parking site in question was at Timarpur with total area of the site being 42,667.851 sq. m., out of which the parking area was only 38,015.62 sq. m. The minimum reserve price (hereinafter, referred to as 'MRP') was kept at Rs.9,45,000/-. The last date for submission of bid was 05.11.2020 and the last dates for opening of technical and financial bids were 09.11.2020 and 17.11.2020 respectively. The bid was to be accompanied by a sum of Rs.9,45,000/- as security deposit. As per the terms and conditions of the NIT, the successful bidder was also required to submit 1 month advance licence fee, 3 months security deposit and 4 months earnest money deposit, within 7 days of the receipt of Letter of Intent (hereinafter, referred to as the 'LOI').

Against the MRP of Rs.9,45,000/-, the petitioner submitted a bid for Rs.36,51,000/-. Almost after one year, he was declared successful bidder and LOI dated 05.10.2021 was communicated to him by the respondent through e-mail dated 11.10.2021. The petitioner accepted the same vide e-mail dated 13.10.2021. The petitioner, vide letters dated 14.10.2021 and 25.10.2021, sought 5/6 months' more time to deposit the balance amount of Rs.2,46,12,000/- in terms of the NIT, after taking physical possession of the site. A provisional Allotment Letter dated 11.11.2021 was issued by the respondent with certain conditions. The physical possession of the parking site was handed over to the petitioner on 18.11.2021.

3. The petitioner has claimed that when he started operating the parking site, he was not allowed to use the entire parking area and was restricted to the use of only 5,005 sq. m. by the association of local shopkeepers. Eventually, vide letter dated 22.12.2021, he requested the respondent to look into the matter and sort out the issue. On 30.12.2021, even the officials of DDA told the petitioner not to use the area beyond 5,005 sq. m. for parking purposes. Pursuant to a letter sent by the petitioner, the DDA on 31.12.2021, through Executive Engineer, NMD-2 (ND-3), supplied the petitioner with layout plan and physical possession slip. In the said physical possession slip, it was stated that physical possession of the vacant designated parking site 'Truck Parking Timarpur' measuring area 5,005 sq. m. was handed over to Deputy Commissioner, R.P. Cell, North Delhi Municipal Corporation. By way of letter dated 31.12.2021, the DDA also communicated to the respondent that only 5,005 sq. m. of parking area was transferred to it, however, on inspection it had come to notice that excess area was being used at the site in unauthorised manner.

On coming to know the actual parking area at the said site available with the respondent, the petitioner, vide letters dated 10.01.2022, 18.01.2022 and 27.01.2022, requested the respondent to take up the issue with the DDA and Traders Welfare Association.

4. It further emerges from the facts that thereafter, a joint inspection of the parking site in question was conducted on 05.03.2022 by officials of DDA and North DMC, in presence of the petitioner. As per the inspection report of the same date, the DDA had handed over only 5,005 sq. m. area to the respondent for parking purposes. Later, the respondent, vide corrigendum/addendum No. 1 dated 11.04.2022, is stated to have put the aforesaid parking site for retender.

Aggrieved by the said action of the respondent, the petitioner had earlier approached this Court by way of W.P.(C) 6323/2022, however, in view of the letter dated 18.04.2022 furnished on behalf of the respondent during the hearing, the said petition was withdrawn with liberty to file a fresh petition also assailing the aforesaid letter.

5. Mr. Ajay Verma, learned Senior Counsel for the petitioner, has contended that issuance of an LOI and a provisional allotment letter as well as handing over of the possession of the parking site, and acceptance of MLF, consequent to which the petitioner had spent time, effort & money for development of the infrastructure at the parking site, resulted in a concluded contract, even though no final formal contract was executed with the petitioner. It is submitted that principles of legitimate expectation and promissory estoppel bind the respondent and execution of the contract remained only a paper formality. It is further submitted that the petitioner had complied with condition Nos. 1 and 2 of the provisional allotment letter, and the time granted for fulfilment of condition No. 3 was till 31.01.2022. However, much before that i.e., after taking over the physical possession of the parking site on 18.11.2021, the petitioner became aware that the respondent had misled him about the actual area of the parking site available with it.

6. It is also contended that the aforesaid action of the respondent in issuing NIT for 38,000 sq. m. was arbitrary as it was all along aware about the actual size of the parking area available with it. It is claimed that the respondent's asking of the petitioner to pay higher MLF for smaller area points to the malafide of the respondent. It is also urged that the respondent could not have taken advantage of its own wrong act and in this regard, learned Senior Counsel has placed reliance on the decisions of the Supreme Court in *Kusheshwar Prasad Singh v. State of Bihar and Others* reported as (2007) 11 SCC 447 and *Haryana Financial Corporation and Another v. Rajesh Gupta* reported as (2010) 1 SCC 655.

7. Lastly, it is contended that the respondent has surreptitiously, without cancelling the first tender, called for retender of the parking site by way of a corrigendum/addendum No. 1 dated 11.04.2022, wherein a higher MRP has been quoted for a smaller parking area. It is also urged that before issuance of letter

dated 18.04.2022, no personal hearing was granted to the petitioner, which goes against the principles of natural justice.

8. Ms. Mini Pushkarna, learned Standing Counsel appearing for the respondent, has contended that though the LOI and provisional allotment letter were issued in favour of the petitioner, the same were subject to the conditions mentioned therein and the petitioner failed to fulfil the same. It is submitted that not only was the said allotment letter issued on provisional/temporary basis, the petitioner also failed to deposit the entire security deposit of Rs.2,82,63,000/- by the last date i.e., 31.01.2022. It is further submitted that no final contract was executed between the parties in view of Clause 8 of the NIT. It is also contended that from the joint inspection of the parking site, it came to fore that only 5,005 sq. m. parking area was available with the respondent, which amounts to change of basic conditions of the tender. Faced with the aforesaid situation, the respondent had no option but to issue a corrigendum/addendum for the parking site in question for area of 5,005 sq. m. only. It is argued that the petitioner had no legal and vested right over the parking site/area in question, especially when no final formal contract was signed by the parties.

9. Lastly, it is submitted that as per the terms and conditions of the NIT, the respondent has the right to determine the MLF and the appropriate remedy for the petitioner is to approach the Civil Court. Learned Standing Counsel has also submitted that the petitioner is at liberty to participate in the fresh process under the corrigendum/addendum.

10. While referring to the decisions relied upon by the learned Senior Counsel for the petitioner, she has submitted that the same are not applicable to the facts of the present case. In support of her submissions, she has additionally relied upon the following decisions :-

(i) Haryana State Industrial Development Corporation Ltd. v. Inderjeet Sawhney reported as (1996) 7 SCC 339;

(ii) Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and Others reported as (2015) 13 SCC 233;

(iii) Maa Binda Express Carrier and Another v. North-East Frontier Railway and Others reported as (2014) 3 SCC 760;

(iv) South Delhi Municipal Corporation v. Ravinder Kumar and Another reported as (2015) 15 SCC 545;

(v) Uflex Ltd. v. Government of Tamil Nadu and Others reported as (2022) 1 SCC 165.

11. In rebuttal, learned Senior Counsel for the petitioner has submitted that the petitioner is ready and willing to accept the new MRP of Rs. 16,38,636/- quoted in the said corrigendum/addendum. It is also submitted that insofar as the respondent's submission that the petitioner is at liberty to take part in retender is

concerned, the petitioner has apprehension that the respondent would not issue the requisite NOC in favour of the petitioner.

12. At this stage, Ms. Mini Pushkarna, learned Standing Counsel, on instructions, submits that without prejudice to the rights and contentions in relation to the disputes between the parties, requisite NOC would be issued to the petitioner.

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

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

15. As required, the petitioner communicated his acceptance. Subsequently, a provisional letter of allotment dated 11.11.2021 was issued to him, indicating that the provisional allotment was subject to signing of contract between the parties. Admittedly, no contract was ever signed by the parties pursuant to the issuance of the LOI and/or the provisional allotment letter. The said allotment letter read as follows:-

“Provisional Allotment Letter

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

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

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

1. You will deposit one month MLF of Rs.36,51,000/- + TCS within 48 hours of issuing this Provisional Allotment Letter.

2. You will deposit the Monthly License Fee on or before 05th of the every month is subsequent months failing which the possession of the site will be immediately taken over by the North DMC from the parking contractor without further communication.

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

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

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

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

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

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

order of the Court.

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

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

22. The respondent's decision to retender the parking site cannot be faulted with since the subject matter of tender has fundamentally changed. In the NIT dated 09.10.2020 an area of 38,015.62 sq. m. was tendered, whereas in the retender corrigendum notice dated 11.04.2022, a significantly reduced area of 5,005 sq. m is offered. The dynamics of the two offers will completely change. A larger parking site may attract lesser number of participants and similarly, a smaller parking site may attract an increased number of participants in the tender. The terms and conditions of the offer may completely change.

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

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

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

i) Whether the process adopted or decision made by the authority is malafide or

intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the Court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

ii) Whether public interest is affected

If the answers are in the negative, there should be no interference under Article 226 of the Constitution of India. However, cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action. Further, a constitutional Court in tender/contractual matters shall be concerned only with lawfulness of a decision, and not its soundness [Refer: Jagdish Mandal (Supra), Maa Binda Express Carrier (Supra) and Bharat Coking Coal Limited (Supra)].

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

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

"45. We again emphasise that the issue of the argument of there being a concluded contract is raised in a petition filed under Article 226 of the Constitution and not by way of suit. The issue whether there was a concluded contract and breach thereof become secondary and is examined by us with that limited scope in mind. In such proceedings main aspect which has to be is as to whether impugned decision of the Port Trust was arbitrary or unreasonable. It is

also important to remark that in a given case even if it is held that there was a concluded contract, whether specific performance can be ordered or not would be a moot question in writ proceedings. The appellant took the calculated risk in not going to the civil court and choosing to invoke extraordinary jurisdiction of the High Court, which is also discretionary in nature.”

(emphasis added)

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

“18.6. Further, the High Court has failed to consider another important fact that the Government being guardian of public finance it has the right to refuse the lowest or any other tender bid or bids submitted by the bidders to it provided its decision is neither arbitrary nor unreasonable as it amounts to violation of Article 14 of the Constitution of India. The appellant Corporation's decision in cancelling its earlier tender is not in violation of Article 14 of the Constitution of India, as the High Court did not find any mala fide intention on the part of the appellant Corporation to favour someone in taking such decision. The appellant Corporation's decision in cancelling the earlier tender notice vide corrigendum dated 30-11-2012 and then issuing a subsequent tender notice dated 13-12-2012 inviting fresh bids from eligible persons for the same works was with a bona fide intention to get better and reasonable rates from the bidders for the execution of the works and not to show favouritism in favour of any bidder. ...”

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

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

need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

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

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

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

32. Before parting with the issue, it may also be observed that prima facie, the respondent appears to have been under a “mistake of fact” regarding the parking area available with it at the time of inviting the initial tender, which was clarified only when the petitioner started operating at the parking site and faced resistance. For that reason, it was necessitated that the parking area be retendered. As such, the act of tendering and cancellation of the initial tender by the respondent, and the subsequent issuance of a corrigendum/addendum, cannot be said to have been arbitrary or unreasonable. Moreover, in case the respondent had continued with the process of allotment under the initial tender, which suffered from a deficiency/error, the same would have eventually raised questions of legality and propriety.

33. Notably, in exercise of power under Article 226 of the Constitution of India, the Court would not interfere in a tender/contractual matter even if a procedural aberration or prejudice to a tenderer is made out, as long as the award of

contract and/or the tender process was carried out bonafide and in public interest. Accordingly, under writ jurisdiction, this Court is not inclined to entertain a disguised plea of specific performance.

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

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

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