Before *Vijender Jain, C.J. & Mahesh Grover, J.*

MAHESH KAPOOR & ANOTHER,—*Petitioners*

versus

HARYANA STATE INDUSTRIAL DEVELOPMENT CORPORATION LTD.—*Respondent*

CWP No. 17321 of 2006

16th July, 2007

Constitution of India, 1950—Arts. 14 & 226—HSIDC inviting sealed offers for awarding of contract for running a Japanese Hostel-cum-Restaurant complex—Petitioner emerged as highest bidder—HSIDC taking decision to lease out complex to a company of Japanese origin after inviting fresh bids—Sufficient, laudable and sustainable reasons given in support of impugned decision—No arbitrariness in process of decision making resorted to by HSIDC which is in complete conformity with avowed objective of providing facilities—No infirmity in action of respondent—Petition dismissed.

Held, that the respondent, in its wisdom, and keeping in view, certain needs and exigencies, has resorted to the issuance of the process of finalisation of the contract afresh with the new eligibility conditions. It is for the government or its instrumentalities to see that what is its object and what is the necessary prescription to meet the stated objective. The Court has neither the expertise nor the requisite material to either infer or conclude to the contrary, unless malice or an ulterior motive is manifest in such an exercise.

(Para 24)

Further held, that a high powered committee took a decision and sufficient, laudable and sustainable reasons have been given in support of the impugned decision obliterating scope and charge of arbitrariness and discrimination. We do not find any arbitrariness in the process of decision making resorted to by the respondent which is in complete conformity with the avowed objective of providing facilities to the investors it seeks to woo,

for the development of the State. The project sans commercialization and it is partly with this objective in mind that the conditions inviting bids from Japanese companies and the Indian companies with majority of share holding from Japanese origin have been imposed in the impugned notice. In the era of globalization of economy, investors choose a destination, where they can have lodging and boarding of their own choice and of their own standards. Therefore, the stipulation in the tender document cannot be said to be discriminatory, arbitrary, oppressive or irrational.

(Paras 27 & 28)

L.M. Suri, Senior Advocate, assisted by Radhika Suri, Advocate, *for the petitioner.*

A. K. Chopra, Senior Advocate assisted by Kamal Sehgal, Advocate, *for the respondents*

VIJENDER JAIN, CHIEF JUSTICE

(1) The grievance of the petitioners is cynosured on the notice dated 9th October, 2006 (Annexure P1) issued by the respondent, inviting sealed offers for renting out of "Japanese Hostel-cum-Restaurant Complex" located adjacent to the Management Development Institute in Gurgaon abutting National Highway No. 8, as also on the process initiated subsequent to the aforesaid notice. They have also prayed for quashing of the notice, as also all the consequential proceedings taken pursuant thereto, in-as-much as, the same are violative of the provisions of Article 14 of the Constitution of India being discriminatory *qua* them as they have been deprived of their legitimate right to run "Japanese Hostel-cum-Restaurant" despite the fact that they were the highest bidders with an offer of Rs. 4.88 Crores for a year in the process initiated pursuant to the notice dated 25th June, 2005 issued by the respondent as against second highest bid of Rs. 2.88 Crores, as also since they were more eminently qualified.

(2) With the aforesaid grievance and the consequent prayer, the petitioners have invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India.

(3) The petitioners are carrying on the business in the name of 'Jhankar Banquets' and claim to have had two decades of wide and varied

experience in the hospitality industry which includes the management of prestigious high end government hostels for senior I.A.S. and I.F.S. Officers, elite national and international sports persons and other such prominent enterprises.

(4) On 25th June, 2005, the respondent published a notice in the Economics Times, Delhi (daily newspaper edition) inviting sealed offers for awarding of a contract for running "Japanese Hostel-cum-Restaurant Complex" at Gurgaon. According to the terms specified therein, the said complex was to be leased out initially for a period of 15 years renewable at the rate of @5% after every five years and the successful bidder was required to furnish all the suites, rooms restaurant and bar, reception area and other facilities, besides providing for day-to-day maintenance. The notice stated that the preference will be given to those companies/agencies which are already coversant with the management of Hotel/Hostel catering to Japanese food, culture and life style etc.

(5) The petitioners, finding themselves qualified as per the terms laid out, responded to the notice. The bids were opened on 25th July, 2005 in the presence of the contestants. such as Bharat Hotels, Maruti Udyog Limited etc.

(6) The petitioners offered an annual licence fee of Rs. 4.88 Crores and emerged as the highest bidders followed by the second highest bid of Rs. 2.88 Crores per year. At the time of opening of the bids, it was alleged by the petitioners, that a promise had been made that the bids would be finalised within a period of two weeks which gave rise to a legitimate expectation to the petitioners that they would be awarded the contract being the highest bidders.

(7) However, the said follow-up action pursuant to the bids did not materialise even though the petitioners had already taken irrevocable steps in furtherance thereof, legitimately expecting the award of contract to them.

(8) The inaction on the part of the respondent led to the filing of C.W.P. No. 17461 of 2005 in which a prayer for issuance of a writ of *mandamus* was made by the petitioners seeking a direction to the respondent to execute the lease deed in their favour on the basis of the aforesaid exercise in which they had emerged as the highest bidders.

(9) During the course of the proceedings in the writ petition ; on 12th September, 2006 the counsel for the respondent produced a copy of the Board's resolution by which another decision had been taken to approve the proposal to lease out "Japanese Hostel-cum-Restaurant" at Gurgaon to a company of Japanese origin after inviting fresh bids. Confronted with such a situation, the aforesaid writ petition was withdrawn by the petitioners with liberty to file fresh writ petition. The respondent, in the meanwhile, pursuant to the decision taken by Board of Directors, invited fresh tenders on 9th October, 2006 and limited the offer to the following companies :—

(a) which are incorporated in Japan or which are incorporated in India but having majority share holding from companies of Janapese origin ;

(b) Which are having net-worth of at least Rs. 100.00 Crores as per last audited balance sheet.

(10) Besides the aforesaid fetter on the participating companies, the following conditions were also imposed in the notice :—

"(i) The complex will be renting out on as is where is basis for a period of 10 years and the rentals will be enhanced by 8% annually. The agreement will be renewed three months before the expiry of the 10th year on mutually agreed tenure, terms and conditions.

(ii) The successful bidder shall at their cost furnish all the suites/ rooms, restaurant, bar reception area and other facilities. Day-to-day maintenance shall be the responsibility of the successful bidder.

(iii) No additions, alteration in the structure will be permissible except the furnishing required for running of the hostel/ restaurant and other facilities.

(iv) The rent of one year will be deposited with the Corporation in advance i.e. before taking over the possession of the hostel complex. Rent will be deposited one year in advance for each following year. An amount equal to one year's

rent shall be deposited as security which will carry no interest.

(v) The hostel complex facilities would be predominatly used by Japanese companies already established or proposing investment in Haryana. However, the restaurant facility/ services will not be limited/restricted to the Japanese companies or their employees only."

(11) The bids were invited to be submitted by 27th October, 2006.

(12) The aforesaid action of the respondent has resulted in the filing of the present writ petition.

(13) The grievance of the petitioners can be encapsulated as follows :—

(1) that the conditions imposed regarding the companies having been incorporated in Japan or the companies incorporated in India having majority share holding from the companies of Japanese origin debarring suitable bidders including the petitioners has no nexus with the object sought to be achieved, i.e. running of "Japanese Hostel-cum-restaurant Complex" at Gurgaon as it is not necessary to be a company of Japanese origin to achieve the said object in the wake of other eligible companies within the country having the necessary expertise available with them to run such an enterprise and achieve the aforesaid objective.

(2) that pursuant to the earlier notice, the petitioners having emerged the highest bidders, had a legitimate expectation for the grant of a contract in their favour and a change subsequently in the entire policy and process has affected their rights adversely and the new conditions seeking to debar them is hit by the provisions of Articles 14 of the Consititution of India.

(14) In support of the aforesaid contentions raised by the learned counsel for the petitioners, reliance was placed on **Union of India** *versus* **Dinesh Engineering Corporation and another, (1)** wherein it was observed as follows :—

> "Where a tender was floated by the Railways for supply of spare parts to be used in GE Governors and petitioner's tender was rejected by taking a policy decision in the context of sophistication, complexity and high degree of precision associated with Governors on the hypothesis that there is no other supplier in the country who is competent enough to supply the spares required for the governors used by the Indian Railways without taking into consideration the fact that the petitioner has been supplying these spare parts for the last over 17 years to various Divisions of the Indian Railways. It was held that the decision of Railway Board suffered from vice of non-application of mind and was violative of Art. 14, particularly when the Railways took the decision to create a monopoly on proprietary basis in a particular company on the ground that the spares required by it for replacement in the governors used by the Railways required a high degree of sophistication, complexity and prescision. Moreover, in such a case, petitioner cannot be excluded from consideration for the supply of spare parts to the GE-Governors on the sole ground that it does not manufacture governors by itself, when the company which was allotted the work also did not manufacture GE-Governors. Further, the Railways were found to be making purchases without any tender on a proprietary basis only from the said company which, was in flagrant violation of the constitutional mandate of Art. 14."

(15) The respondent, who entered appearance, stated that even though earlier the process had been initiated, yet, the matter was re-considered in a meeting held on 17th August, 2006 and keeping in view the fact that the facilities of "Japanese Hostel-cum-restaurant Complex" were to be used predominantly by the personnel of such companies of Japanese origin in the State and the country, who were proposing investments in Haryana and that the project was not meant for a commercial venture,

(1) AIR 2001 S.C. 3887

hence it was decided to limit the bidding to the companies incorporated in Japan or the companies incorporated in India but having majority share holding from the companies of Japanese origin with an avowed object to cater to the personnel of the Japanese origin as these companies would be in a better position to understand and respond to the needs of the Japanese people. The aforesaid decision was taken by a Committee already constituted under the chairmanship of the Financial Commissioner and Principal Secretary to the Government, Haryana, Industries Department with Managing Director, Haryana State Industrial Development Corporation, Director Industries, Haryana Chief Town Planner, Haryana and Head of Accounts, Haryana State Industrial development Corporation.

(16) The "Japanese Hostel-cum-Restaurant Complex" at Gurgaon was to come up in an area measuring 3.82 acres and apart from restaurant, it was to have a Business Centre, Conference Hall, Banquant Hall, Swimming Pool, Gym Bar, 40 single occupancy room and 15 double occupancy suites. The outsiders were only entitled to take Japanese food and the premises was not available to them for holding any social function. As such, the participation of the outsiders was limited only to the restaurant and no further commercialization was permissible implying thereby that the hostel was to be used entirely for the Japanese personnal.

(17) Apart from pleading the aforesaid facts, reliance was placed on **Tata Cellular** *versus* **Union of India (2),** to contend that the scope of judicial review was limited in such like matters.

(18) We have heard the learned counsel for the parties at length and have considered their rival contentions in the backdrop of the aforesaid controversy. We have also perused the minutes of the meeting leading to the impugned decision of the respondent.

(19) In **Tata Cellular** *versus* **Union of India** (*supra*), a 3-Judges Bench of the Supreme Court, after exhaustive consideration of various decisions, laid down the following principles for exercise of power of judicial review in such like matters :—

> "(1) The modern trend points to judicial restraint in administrative action.

(2) (1994)6 S.C.C. 651

(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 body functioning in 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 arbitrations 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 unbonneted expenditure."

(20) In **Monarch Infrastructure (P) Ltd.** *versus* **Commissioner, Ulhasnagar Municipal Corporation and others (3),** it was held as under :—

"The terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations."

(3) J.T. 2000 (6) S.C. 560

(21) In **Directorate of Education & Ors.** *versus* **Educomp Datamatics Ltd. & Ors. (4),** their Lordships of the Supreme Court observed as under :—

> "It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, *mala fide* or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or *mala fide*."

(22) The aforesaid principles were reiterated in **M/s Master Marine Service Pvt. Ltd.** *versus* **Metcalfe & Hodgkinson Pvt. Ltd. and Anr. (5).**

(23) The principles of law having been fairly well settled, we propose to examine the controversy in the light of the aforesaid.

(24) The respondent, in its wisdom, and keeping in view, certain needs and exigencies, has resorted to the issuance of the process of finalisation of the contract afresh with the new eligibility conditions. It is for the government or its instrumentalities to see that what is its object and what is the necessary prescription to meet the stated objective. The Court has neither the expertise nor the requisite material to either infer or conclude to the contrary, unless malice or an ulterior motive is manifest in such an exercise.

(25) The contention of the petitioners that there is no nexus between the impugned action of the respondent and the objective sought to be achieved seems entirely misplaced as the decision making process resorted

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(4) J.T. 2004 (Suppl. I) S.C. 502
(5) J.T. 2005(4) S.C. 408

to by the respondent which has been perused by us clearly reveals the anxiety to cater to the needs of a particular class of investors for whom such a facility is an essentiallity. To instill confidence in the investors, both existing and proposed, the State Government/the respondent is very well within its right to limit the participation to a particular class of persons/ companies in the tender process and to lay down any such prescriptions as deemed necessary.

(26) Having observed, thus, we propose to examine the mechanism and the process leading to the impugned decision.

(27) A perusal of the record is enlightening and reveals that a high powered committee took a decision and sufficient, laudable and sustainable reasons have been given in support of the impugned decision obliterating scope and charge of arbitrariness and discrimination as alleged by the petitioners. We do not find any arbitrariness in the process of decision making resorted to by the respondent which is in complete conformity with the avowed objective of providing facilities to the investors it seeks to woo, for the development of the State. The project sans commercialization and it is partly with his objective in mind that the conditions inviting bids from Japanese companies and the Indian companies with majority of share holding from Japanese origin have been imposed in the impugned notice.

(28) Before parting, we must emphasize that in the era of globalization of economy, investors choose a destination, where they can have lodging and boarding of their own choice and of their own standards. Therefore, the stipulation in the tender document cannot be said to be discriminatory, arbitrary, oppressive or irrational.

(29) For the reasons stated above, we do not find any infirmity in the action of the respondent and consequently, we dismiss the writ petition.

R.N.R.