

M/S Master Marine Services Pvt. Ltd vs Metcalfe & Hodgkinson Pvt. Ltd. & Anr on 19 April, 2005

Equivalent citations: AIR 2005 SUPREME COURT 2299, 2005 (6) SCC 138, 2005 AIR SCW 2189, 2005 (3) SLT 664, (2005) 2 BLJ 488, (2005) 31 ALLINDCAS 234 (SC), 2005 (31) ALLINDCAS 234, (2005) 4 JT 408 (SC), 2005 (4) SCALE 216, 2005 (4) JT 408, 2005 (5) SRJ 310, 2005 (2) CTLJ 48, (2005) 3 ALLMR 657 (SC), 2005 BLJR 2 1252, (2006) 1 MAD LW 170, (2005) 3 PAT LJR 97, (2005) 4 SUPREME 578, (2005) 4 SCALE 216, (2005) 119 DLT 139, (2005) 3 SCJ 648, (2005) 2 BANKCAS 574, (2005) 1 WLC(SC)CVL 716, (2005) 2 CAL LJ 156

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Bench: R.C. Lahoti, G. P. Mathur

CASE NO.:

Appeal (civil) 1853 of 2005

PETITIONER:

M/s Master Marine Services Pvt. Ltd.

RESPONDENT:

Metcalfe & Hodgkinson Pvt. Ltd. & Anr.

DATE OF JUDGMENT: 19/04/2005

BENCH:

CJI R.C. Lahoti & G. P. Mathur

JUDGMENT:

J U D G M E N T G.P. MATHUR, J.

1. This appeal, by special leave, has been preferred against the judgment and order dated 15.12.2004 of Delhi High Court, by which the writ petition filed by the first respondent, Metcalfe & Hodgkinson Pvt. Ltd. was allowed and the contract of work of professional services given by second respondent, Container Corporation of India in favour of the appellant was quashed.

2. The second respondent, Container Corporation of India (for short 'CONCOR') floated a limited tender in December 2003 for hiring professional services for survey of containers and cargo at Inland Container Depot (for short 'ICD'), Tughlakabad, Delhi, for a period of 24 months. The contract was to be awarded through a two bid process. The first part was to consist of "Pre-Qualification Bid", which was to be accompanied by various documents showing experience,

constitution of the firm/company, turn over for past three years, a copy of the license to act as surveyor/loss assessor under the Insurance Act, 1938, besides other matters and earnest money in the form of bank draft/pay order. The second part was to consist of the "Financial Bid". The technical bid was to be opened on 15.12.2003 and the financial bid was to be opened on 28.2.2004. After opening the technical bid, the CONCOR pre-qualified two bidders, viz., the appellant and the first respondent. Thereafter, the financial bid was opened. The bid of the appellant was Rs.3.00 per container while that of the first respondent it was Rs.3.75 per container and as the appellant's bid was 25 per cent lower than that submitted by the first respondent, its bid was accepted and the work was awarded to it. The first respondent initially filed Writ Petition (C) No.3687 of 2004 before the Delhi High Court challenging the eligibility of the appellant to participate in the tender process, mainly on the ground that the appellant did not have a license to act as a surveyor/loss assessor under the Insurance Act, 1938, and in support of this submission it was urged that on an earlier occasion, the bid submitted by the appellant had been rejected on the said ground. The High Court summarily dismissed the writ petition by observing that in the meanwhile the appellant might have obtained the requisite license and the court cannot be asked to undertake a roving or fishing enquiry as it is for the appropriate authority to consider and decide the matter in accordance with law. The special leave petition preferred by the first respondent against the said order was also dismissed by this Court on 5.5.2004.

3. Thereafter, the first respondent filed another writ petition on 27.5.2004 praying that the order passed by the second respondent awarding the contract of survey of containers and cargo at ICD, Tughlakabad, Delhi and ancillary facilities to the appellant pursuant to the tender notice dated 15.12.2003 be quashed and a writ of mandamus be issued to the second respondent to award the said contract to it (first respondent). The main plea taken in the writ petition was that the appellant did not meet the eligibility criteria as it did not have a licence to act as surveyor/ loss assessor under the Insurance Act, 1938. In the counter affidavit filed by the CONCOR, it was pleaded that both the appellant and the first respondent did not fulfill the conditions mentioned in the eligibility criteria in the tender. However, clause 12 of the Instructions regarding submission of tender provided that the CONCOR had the power to relax the tender conditions and exercising power under the said clause, it had qualified both the bidders in public interest. It was further submitted that the appellant had submitted copy of license from the Insurance Regulatory and Development Authority (for short 'IRDA') in the name of Percy Meher Master. The appellant had clarified that the said license had been issued in the name of Capt. Percy Meher Master in his capacity as proprietor of Master Marine Services. Subsequently, the said proprietorship concern had been converted into a private limited company, of which Capt. Percy Meher Master was appointed as Chairman. The Tender Evaluation Committee (for short 'TEC') had deliberated upon the said fact and after taking into consideration the fact that the appellant was known to be an established surveyor doing work of number of shipping lines and that Capt. Percy Meher Master had been appointed as Chairman of the Company by its Board, the tender committee took a decision that the financial bids of both the bidders be opened. The first respondent had enclosed two IICL certificates, but the same were not in conformity with the tender conditions. It was further pleaded that the major work (98%) under the contract is of data entry i.e. recording of container number, seal number, condition of seal and external condition of container on arrival and dispatch of containers from the ICD for which the appellant had quoted Rs.3.00 per container against Rs.3.75 of the first respondent and for such kind

of work no license under IRDA is required. Having regard to the fact that the bid offered by the first respondent for external survey of a container, which is the main work, was 25 per cent higher than that of the appellant, the work was awarded to the appellant.

4. The appellant also filed a counter affidavit stating that Capt. Percy Meher Master started a sole proprietorship business of marine and cargo surveyors by the name of Master Marine Services in February, 1983. He had in his name a license to act as a surveyor/loss assessor under the Insurance Act, 1938. As over the years the business had considerably increased, a private limited company by the name of Master Marine Services Pvt. Ltd. was formed on 6.10.1997, which took over the entire business of the proprietorship concern. The main object of the company is to carry out ship, cargo and marine surveys and to act as loss assessors and technical consultants. In the company 40.02 per cent shares are held by Capt. Percy Meher Master and the remaining shares are held by his wife, son and daughter and all four of them are directors in the company. It was also stated that an agreement was entered into on 15.10.1997, whereunder Capt. Percy Meher Master who is the Chairman and Managing Director of the company, would be employed as a consultant with the company and he will sign all survey reports on behalf of the company. Besides this, several other pleas were also taken including a plea that the second writ petition was barred by the principles of res judicata and Order 2 Rule 2 CPC as an earlier writ petition filed by the first respondent had already been dismissed by the High Court and the special leave petition preferred against the said order had also been dismissed.

5. The High Court after a detailed examination of the material on record held that the appellant had failed to fulfill an essential pre-qualification norm as it did not have a license to act as surveyor/loss assessor in its name under the Insurance Act. It was further held that the second respondent, the CONCOR was bound to observe the eligibility criteria scrupulously and consequently the bid of the appellant could not be entertained. It was accordingly held that the decision of the CONCOR to accept the tender of the appellant being violative of the equity clause of the Constitution, suffers from the vice of arbitrariness and, therefore, could not be sustained. The High Court accordingly allowed the writ petition filed by the first respondent and quashed the award of contract of professional services made in favour of the appellant. It was, however, directed that in view of the fact that the appellant had already commenced the work, it could continue to do the work assigned under the contract till the CONCOR reconsidered the bid submitted by the first respondent. It was further directed that it will be open to the CONCOR to negotiate with the first respondent the bid price and if they are satisfied with their offer, the contract shall be awarded to them, failing which fresh tenders may be invited.

6. Learned counsel for the appellant has submitted that the only ground on which the High Court has set aside the award of contract to the appellant is that it does not possess a license to act as surveyor/loss assessor under the Insurance Act, 1938. Initially in the year 1983, Capt. Percy Meher Master, who had a license to act as surveyor/loss assessor under the Insurance Act, had started a sole proprietorship business in the name of Master Marine Services. Subsequently, on account of increase in business, he formed a private limited company in 1997 by the name of Master Marine Services Pvt. Ltd. (appellant herein), which took over the entire business of Master Marine Services (the sole proprietorship concern). Capt. Percy Meher Master holds 40.02 per cent share holding in

the said company and the remaining is held by his wife, son and daughter who are all directors of the company. The company had also entered into an agreement whereunder Capt. Percy Meher Master, who is also the Chairman and Managing Director of the company, will be employed as consultant. Having regard to these facts, it could not be said that the appellant did not hold a license to act as surveyor/loss assessor. Learned counsel has further submitted that the tender document contained a clause that the CONCOR had a right to relax the tender conditions. The TEC after careful examination of the entire matter had approved the technical bid of the appellant and in view of the fact that the bid made by the appellant was 25 per cent lower than that of the first respondent, the contract was awarded to it. It has thus been submitted that the High Court, while hearing a writ petition under Article 226 of the Constitution, has not acted under the well-defined parameters of judicial review of administrative action in setting aside the order of the CONCOR in awarding the contract to the appellant. The learned counsel for the first respondent has, on the other hand, submitted that the condition regarding holding of a license to act as surveyor/loss assessor under the Insurance Act was an essential condition which could not be relaxed. Section 64-UM of the Insurance Act mandates that no person shall act as surveyor or loss assessor in respect of general insurance business unless he holds a valid license issued to him by Insurance Regulatory and Development Authority. Sub-section (D) of this Section lays down that no license to act as a surveyor or loss assessor shall be issued unless the applicant, where he is an individual, satisfies the Authority that he possesses the qualification enumerated in sub-clauses (a) to (g) and where the applicant is a company or firm, it satisfies the Authority that all its directors and partners, as the case may be, possess one or more qualifications as aforesaid and none of such directors or partners suffer from any of the disqualifications mentioned in sub-section (4) of Section

42. Learned counsel has thus submitted that there being no license in favour of the appellant, which is a company, its technical bid ought to have been rejected and there was no occasion for considering the financial bid made by it and in such circumstances the CONCOR erred in awarding the contract to the appellant.

7. In order to appreciate the contention raised by the learned counsel for the parties, it is necessary to briefly notice the relevant part of the tender document. Chapter I deals with 'Instructions Regarding Submission Of The Tender'. Para 2 gives a long list of documents which had to be submitted for pre-qualification bid. The relevant parts of para 1, para 2, para 3 and para 11 of the instructions are being reproduced below :

1. The tendering will be through a two bid process. Document duly completed should be submitted in two parts.
2. First part will consist of "Pre-Qualification Bid" for tender for professional services for survey of cargo/containers for CONCOR at ICD/TKD and should be superscribed as such. It should be sealed in a separate envelope, to be called envelope "A". The envelope must contain the following documents :

(a)

.....

(g) Copy of license to act as surveyor/loss assessor under Insurance Act, 1938.

.....

3. The second part will consist of the "Financial Bid" for tender for professional services for survey of containers and cargo for CONCOR at ICD/TKD and should be superscribed similarly on the second envelope as such. Only the Schedule of Rates as given in Annexure III should be completely filled up, signed and placed in this envelope which should be sealed. This envelope will be called Envelope "B".

.....

11. CONCOR reserves the right to amend the tender document, if considered necessary, with due intimation to respective tenderers prior to the last date of submission. CONCOR also reserves the right to extend the date of submission and opening of tender if considered necessary to allow reasonable time to the tenderers in such cases.

CONCOR also reserves the right to

- accept or reject any tender in part or in full without assigning any reason whatsoever.
- Relax the tender condition at any stage if considered necessary for the purpose of finalizing the contract in the overall interest of the CONCOR and the trade.
- Accept/reject any or all the technical bids or financial bids.

The tender document shows that the CONCOR had adopted a two bid process for making selection and award of the contract. The first part consisting of "pre-qualification bid" required submission of documents to show proof of experience, deposit of earnest money, constitution of the firm/company, turn over for past three years, proof in support of having employed at least 20 persons including IICL certified supervisors for preceding three years. The second part related to financial bid and this was to be considered only for such tenderers who were short-listed in the pre-qualification bid. Para 2(g) which has been quoted above, only required "a copy of license to act as surveyor/loss assessor under Insurance Act, 1938". It may be noted that the tender document does not say that in case where a company has made a bid, the license to act as surveyor/loss assessor under the Insurance Act must be in the name of the company itself or that a license personally in the name of the Chairman or a Director of a Company would not be treated as a valid compliance of the requirement of tender. Para 11 of the Instructions is important. The CONCOR reserved the right to amend the tender document, if considered necessary, with due intimation to the respective tenderers prior to the last date of tender submission. The CONCOR also reserved the right to relax the tender conditions at any stage, if considered necessary, for the purpose of finalizing the contract in the overall interest of the CONCOR and the trade.

8. The Tender Evaluation Committee of the second respondent held a meeting on 17.1.2004 where the technical bids of the appellant and the second respondent were considered and recorded as under in the notings :

"The documents given by M/s Metcalfe are perfectly in order. There is slight ambiguity about one of the documents given by M/s Master Marine Services. This concerns the surveyor license. The license is issued in the name of Mr. Percy Meher Master who is the sole proprietor of M/s Master Marine Services. The license issued by the IRDA mentions Mr. Percy as being the sole proprietor of M/s Master Marine Services. As per our tender criteria, clause 1(d), Chapter 2 (pg.6) mentions that the tenderer must have license to act as surveyor/loss assessor under Insurance Act, 1938. The TEC feels that there are only two bidders in this tender. It would be desirable to prevent this tender from lapsing into a single bidder tender. Therefore, the TEC feels that, subject to the approval of Accepting Authority, Master Marine Services can be asked to provide proof of the company, i.e. Master Marine Services, having a survey license in the name of the company. This might require the company to get an endorsement on the license issued to Sh. Percy as per clause-3 of the license issued by IRDA. The Committee feels that subject to M/s Master Marine fulfilling this condition, both the bidders can be considered for short-listing and date fixed for opening the financial bids by the accepting authority.

This is without prejudice to Competent Authority's discretion to accept/reject/modify/amend the Committee's recommendations."

A letter was thereafter sent to the appellant to provide proof that the company is having a license in its name or an endorsement in the name of the company in their subsisting license issued by the IRDA. The appellant informed that the license had been issued in the name of Capt. Percy Meher Master in his capacity as proprietor of Master Marine Services, who was now the Chairman of the Company and a copy of the Resolution of the Board was also enclosed. The TEC then considered the matter again and recorded the following in the minutes of the meeting:

"The TEC therefore, opines that M/s Master Marine Services Pvt. Ltd. is known to be an established surveyor doing work for a number of shipping lines at various CONCOR terminals. Moreover, Mr. Percy Meher Master who was the sole proprietor of M/s Master Marine Services has been appointed the Chairman of the Company by its Board. Therefore, they do have adequate experience and credentials to carryout the survey activities.

In view of the above, Tender Committee is of the opinion that we may qualify both the tenderers, M/s Master Marine Services Pvt. Ltd. and M/s Metcalfe & Hodgkinson Pvt. Ltd., for their Technical capabilities. It is therefore recommended that the financial bids of these two agencies can be opened on a date with due intimation to both the bidders.

Competent Authority may accept/reject/modify the recommendation of the TEC as deemed fit."

The recommendation of the TEC was accepted and the appellant was held to be qualified and the financial bids of the first respondent and the appellant were thereafter opened. As already stated, the financial bid of the appellant was Rs.3.00 as against Rs.3.75 of the first respondent for data entry i.e. recording of container number, seal number, condition of seal and external condition of container on arrival and dispatch of containers from the ICD. It is also the case of the second respondent that the major work (98%) under the contract is of the aforesaid nature for which no license under IRDA is required. Thereafter, the work was awarded to the appellant.

9. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three Judge Bench in *Tata Cellular v. Union of India* AIR 1996 SC 11. It was observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. (See para 85 of the reports.) After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, a fairplay 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* principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by *mala fides*. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the reports.)

10. In *Sterling Computers Ltd. v. M/s M.N. Publications Ltd.* AIR 1996 SC 51 it was held as under :

"While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process." By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such

enquiry. But at the same time the Courts can certainly examine whether "decision making process" was reasonable rational, not arbitrary and violative of Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into such contract."

11. In *Raunaq International Ltd. v. I.V.R. Construction Ltd.* 1999 (1) SCC 492 it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of ability to deliver the goods or services as per specifications.

12. The law relating to award of contract by State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.* 2000 (2) SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

13. The only ground on which the High Court has quashed the decision of CONCOR awarding the contract to the appellant is that there was no license to act as surveyor/loss assessor under the Insurance Act, 1938 in favour of the appellant which is a company. This question was considered by the TEC in its meeting held on 17.1.2004. The TEC also took notice of the fact that there were only two bidders (the appellant and the first respondent) in the tender and it would be desirable to prevent the tender from lapsing into a single bidder tender. After receipt of the reply from the appellant, the TEC again evaluated the tenders for pre-qualification bid and after noting that M/s Master Marine Services Pvt. Ltd. is known to be an established surveyor doing work for a number of shipping lines at various CONCOR terminals and further that Capt. Percy Meher Master, who had the license, had been appointed the Chairman of the company, made a recommendation that both, the appellant and the first respondent may be qualified for their technical capabilities. It has to be borne in mind that para 11 of the Instructions clearly conferred a power upon the CONCOR to relax the tender conditions at any stage, if considered necessary, for the purpose of finalizing the contract in overall interest of the CONCOR and the trade. Therefore, having regard to the fact that the Chairman of the company had a license under the Insurance Act, the condition regarding the

holding of such a license by the appellant itself, in the facts and circumstances of the case, could be relaxed. So far as commercial considerations are concerned, it is the specific case of the CONCOR, which has not been disputed by the first respondent, that ninety eight per cent of the work under the contract is of data entry of a container, for which the appellant had quoted Rs.3.00 against Rs.3.75 as quoted by the first respondent and for this kind of work no license under IRDA is required. In such circumstances, no such public interest was involved which may warrant interference by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while undertaking judicial review of an administrative action relating to award of a contract. We are, therefore, clearly of the opinion that the High Court erred in setting aside the order of the CONCOR awarding the contract to the appellant.

14. For the reasons discussed above, the appeal is allowed with costs and the judgment and order dated 15.12.2004 of the High Court is set aside. The writ petition filed by the first respondent is dismissed.