IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1853 OF 2008

1. Alok Parshuram Jalan)
Managing Director of Laqshya Media Private Limited)
a Private Limited Company, registered)
under the provisions of the Companies Act, 1956)
and having its registered office at Unit No. 17,)
Andheri Industrial Estate, Off. Veera Desai Road,)
Andheri (West), Mumbai-400 053)

2. Laqshya Media Private Limited,)
a Private Limited Company, registered)
under the provisions of the Companies Act, 1956)
and having its registered office at Unit No. 17,)
Andheri Industrial Estate, Off. Veera Desai Road,)
Andheri (West), Mumbai-400 053)...Petitioners

versus

1. The Brihanmumbai Electric Supply and)
Transport Undertaking (governed under the)
Municipal Corporation of Greater Mumbai), having)
its address at Electric House, Post Box No. 192,)
Colaba, Mumbai-400 001.)

2. The Municipal Corporation of Greater Mumbai,)
a body corporate constituted under the provisions)
of the Municipal Corporation of Greater Mumbai)
Act, 1888, and having its head office at)
Mahapalika Marg, Near CST, Mumbai-400 001)

3. Pioneer Publicity Corporation Private Limited,)
a Private Limited Company registered under the)
provisions of the Companies Act, 1956 and having)
its registered office at 410-416, Anjani Complex,)
Pereira Hill Road, Opp. Guru Nanak Petrol Pump,)
Off Andheri Kurla Road, Andheri (East),)
Mumbai-400 099)

4. State of Maharashtra,)
having their office at High Court annexe Building,)

(PWD) Building, Fort, Mumbai-400 032)..Respondents

Mr. S.C. Naidu, assisted by Mr. M.M. Gujar, Mr. N.P. Dalvi and S.R. Ingule, instructed by Shri Shoaib I. Memon for the petitioners.

Mr. S.G. Aney, Senior Advocate, with Mr. H. Toor, Mr. Sunil Chavan and Mr. D.G. Dhanure, instructed by M/s. M.V. Kini & Company, for respondent No.1.

Mrs. S.M. Modale for respondent No.2.

Mr. Janak Dwarkadas, Senior Advocate, with Mr. M.D. Siodia and Ms. Manmeet Arora, instructed by M/s. Rustamji & Ginwala, for respondent No.3.

Mr. A.B. Ketkar, AGP, for respondent No.4.

WITH

WRIT PETITION NO. 1997 OF 2008

Abha Surender Gulati, of Mumbai,)
Indian Inhabitant, being sole Proprietress of)
M/s. Alakh Advertising & Publicity, having her)
address at 3, Cosmos Commercial Centre, 2nd floor,)
3rd Road, Khar (West), Mumbai-400 052)...Petitioner

versus

1. The Brihan Mumbai Electric Supply and Transport)
Undertaking (governed under the Municipal)
Corporation of Greater Mumbai) having its address)
at Electric House, Post Box No. 192, Colaba,)
Mumbai-400 001)

2. M/s. Pioneer Publicity Corporation, a registered)
partnership firm, carrying on business at 410-416)
Anjani Complex, Pereira Hill Road,)
Opp. Cine Magic, Andheri-Kurla Road,)
Mumbai-400 099)

3. State of Maharashtra,)
having their office at High Court Annexe)
Building (PWD), Fort, Mumbai-400 032.)...Respondents.

Mr. Rajiv Narula, instructed by M/s. Jhangiani, Narula & Associates, for the petitioner.

Mr. S.G. Aney, Senior Advocate, with Mr. H. Toor, Mr. Sunil Chavan and Mr. D.G. Dhanure, instructed by M/s. M.V. Kini & Company, for respondent No.1.

Mr. Janak Dwarkadas, Senior Advocate, with Mr. M.D. Siodia and Ms. Manmeet Arora, instructed by M/s. Rustamji & Ginwala, for respondent No.2.

Mr. A.B. Ketkar, AGP, for respondent No.3.

WITH

WRIT PETITION (LODGING) NO. 2111 OF 2008

M/s. Prithvi Associates,)
a Company incorporated under the provisions)
of the Companies Act, 1956, having its office at)
18/2, Prabhadevi Industrial Estate,)
Opp. Siddhivinayak temple, Prabhadevi,)
Mumbai-400 025)..Petitioner

versus

1. The Brihan Mumbai Electric Supply and)
Transport Undertaking, a statutory body)
constituted under the provisions of the Bombay)
Municipal Corporation Act, 1888 having its)
office at Brihan Mumbai Electric Supply &)
Transport Undertaking, Electric House, BEST)
Marg, Colaba, Mumbai-400 001.)

2. Mr. Uttam Khobragade,)
General Manager, B.E.S.T.,)
having his office at Brihan Mumbai Electric)
Supply & Transport Undertaking,)
Electric House, BEST Marg, Colaba,)
Mumbai-400 001)

3. State of Maharashtra, through the)
Government Pleader, High Court,)
Mumbai.)

4. M/s. Pioneer Publicity Corporation Pvt. Ltd.)
having its office at 113/114 Anjani Complex,)

Pereira Hill Road, Opp. Gurunanak Petrol Pump)
Off. Andheri-Kurla Road, Andheri (East),)
Mumbai-400 099)..Respondents

Mr. Sudhir Nanavati with Mr. Birendra Saraf, Mr. Subhash Jadhav and Mr. Daljeet Singh Bhatia, instructed by M/s. ALMT Legal for the petitioner.

Mr. V.A. Thorat, Senior Advocate, with Mr. H. Toor, Mr. Sunil Chavan and Mr. D.G. Dhanure, instructed by M/s. M.V. Kini & Company, for respondent Nos.1 and 2.

Mr. A.B. Ketkar, AGP, for respondent No.3.

Mr. S.U. Kamdar, Senior Advocate, with Mr. M.D. Siodia and Ms. Manmeet Arora, instructed by M/s. Rustamji & Ginwala, for respondent No.4.

CORAM: **P.B. MAJMUDAR** &
A.A. SAYED, JJ.

Judgment reserved on: 16th September, 2008
Judgment pronounced on: 23rd September,2008

ORAL JUDGMENT (Per P.B. Majmudar, J.)

Rule. Learned counsel appearing for respective respondents waive service of Rule.

2. Since common point is involved in all these petitions, with the consent of the learned counsel, all these petitions were heard together and are disposed of now by this common judgment. For the sake of convenience, the facts are taken from Writ Petition No. 1853 of 2008, as the main dispute is common in all these petitions.

3. The main challenge in these writ petitions is to the award of

contract for display of advertisements by affixing kiosks on pole and non illuminated display board on bracket of street lighting pole belonging to the Brihan Mumbai Electric Supply and Transport Undertaking ("BEST") and Municipal Corporation of Greater Bombay for a period of 36 months, on the ground that at the time of processing various tenders, respondent No.1 has deviated from the conditions incorporated in the tender conditions illegally, arbitrarily and in a surreptitious manner the tender of respondent No.3 has been accepted. So far as the petitioners in Writ Petition No.1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008 are concerned, they have also taken additional challenge in the petitions in connection with blacklisting the said petitioners by respondent No.1.

4. Respondent Nos. 1 and 2 issued an advertisement on 3rd July, 2008, inviting bids in connection with display of advertisement by affixing kiosks on pole and non illuminated display board on bracket on approximately 32,473 street lighting poles belonging to respondent Nos. 1 and 2 in the old city limits of Mumbai for a period of 36 months. The tender conditions and instructions to tenderers categorically stated that the expected revenue in this contract is minimum Rs. 33 crores and offer below the minimum prescribed will not be accepted. A corrigendum dated 22nd July, 2008, was issued by respondent No.1 stating that respondent No.2 is unlikely to accord sanction in respect of non-illuminated display boards and the bids may be quoted accordingly and that the Undertaking will conduct

auction amongst the eligible bidders immediately after opening the tender on 24th July, 2008 at 16.00 Hrs. Pursuant to the above advertisement, as per the averments in Writ Petition (Lodging) No. 2111 of 2008, 15 prospective bidders purchased the tender forms, out of which on the relevant day only four bidders responded with the payment of earnest money deposit. It is the case of the petitioners that on the relevant day i.e. 24th July, 2008, four tenderers were present which includes the present three writ petitioners and Pioneer Publicity Corporation Pvt. Ltd., the successful bidder. On that day none of the petitioners submitted their tender till 15.00 hrs. subsequent to which Mr. A.A. Mule, Chief Engineer (Works) invited discussions with regard to the suggestions made by the tenderers. At that time a grievance was made by all of them about the minimum reserve price prescribed in the tender. According to the petitioners, the said Mr. Mule informed the tenderers present that a fresh advertisement would be issued in this behalf and on such assurance, the petitioners left the place.

5. It is the case of the petitioners that after the petitioners were assured that the fresh tenders will be invited by reducing the minimum reserve price, they left the place and subsequently it was not open for the respondents to accept the tender submitted by respondent No.3 at about 5.00 p.m. on the same day for an amount of Rs. 21 crores for a period of three years. According to the petitioners, respondent Nos. 1 and 2 have acted in an arbitrary manner and have abused the powers vested in them

and thus the action of awarding the tender to respondent No.3 is highly arbitrary. The procedure adopted by respondent Nos. 1 and 2 is also arbitrary and contrary to the conditions of tender in awarding the contract to respondent No.3 below the minimum reserve price as provided in the tender conditions for the contract.

6. Mr. Naidu, learned counsel appearing for the petitioners in Writ Petition No. 1853 of 2008, has challenged the said procedure mainly on the ground that it was not open for the first respondent to alter the essential conditions of the tender. It is further submitted by Mr. Naidu that the essential terms of the tender cannot be changed unless fresh advertisement is issued so that the people at large could have taken part. It is further submitted by Mr. Naidu that when the minimum reserve price was fixed at Rs. 33 crores, it was not open for the respondents to reduce the same at the time of submitting the tender by accepting the tender of respondent No.3 for Rs. 21 crores. The tenders were to be opened at 3.00 p.m. on 24th July, 2008. It was not open for the respondents to extend the time as ultimately it was opened at 5.00 p.m. He further submitted that even the minimum reserve price which was fixed at Rs. 33 crores is arbitrary and without any rationale basis and that there as no norms and standard which were taken for fixing such amount. It is submitted by Mr. Naidu that even the internal note states that four bidders were not interested in the tender and that the four bidders were cartelling amongst themselves. Inspite of the above, the

action of awarding the tender to respondent No. 3 is highly arbitrary and is violative of Article 14 of the Constitution of India. The first respondent was bound by the conditions prescribed in the tender documents and could not have altered the said condition while awarding the contract. He further submitted that for changing any conditions in the tender, notice of the same was required to be given to all the tenderers who had purchased the tender forms. The petitioners have, therefore, prayed that the tender awarded to respondent No.3 be quashed and respondent No.1 be directed to re-tender the same or in any case by inviting the four tenderers who were present on the relevant date. During the course of hearing it was submitted by Mr. Naidu that subsequently the petitioners also came to know that a decision was also taken blacklisting the petitioners for forming a cartel with other bidders as set out in the note of the BEST Committee. The petitioners in Writ Petition No. 1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008, have also challenged the decision taken by the respondent Nos. 1 and 2 for blacklisting them.

7. Mr. Naidu has taken us through the various documents forming part of the petition as also cited various judgments to substantiate his argument that it was not open for the first respondent to alter the essential condition of tender at the last minute and that the act of the respondent No.1 in allowing the petitioners to leave the premises with an assurance that fresh tenders would be invited and thereafter accepting the tender of respondent

No.3 is illegal. The action of respondent No.1 in awarding the contract to respondent No.3 below the minimum reserve price as provided in the tender conditions is also illegal, arbitrary and contrary to the conditions of tender. The learned counsel appearing for the petitioners in other two writ petitions have adopted the arguments of Mr. Naidu. However, in their respective petitions, additional challenge is also made in connection with the order passed by respondent No.1 in blacklisting them. They submitted that the action of respondent No.1 in blacklisting the petitioners from participating in the tenders floated by respondent No.1 for five years is unreasonable and arbitrary and smacks of bias and discrimination against the petitioners.

8. The petition has been resisted by the learned counsel appearing for the respondents. Mr. Aney, learned counsel appearing for the first respondent took a preliminary objection to the effect that the petitioners neither bid nor participated in the bidding process and thus they have no right to make any grievance. Mr. Aney further submitted that it is not correct to say that the petitioners were not present at the time of opening of the tender. Mr. Aney further submitted that the Chief Engineer (Works) has requested all the eligible bidders and their representatives that the matter will be decided on the same day and that time to drop the bid will be extended with the approval of the General Manager, BEST. The same has been communicated to all the eligible bidders and they were told to give their best offer. Mr. Aney has further submitted that even though the present

petitioners were present all throughout, they did not submit their tender forms and only respondent No.3 chose to put in the tender. Thus the bid of respondent No.3 was accepted. It is submitted that the entire process has taken place in the presence of all the petitioners. However, subsequently the petitioners in Writ Petition No. 1853 of 2008 refused to sign and left the venue. He submitted that there were only four tenderers present on the relevant day. The matter was discussed and the petitioners were told to submit their own bid, but inspite of that the petitioners have failed to make any offer either at the time of opening of the tender or any time thereafter. It is submitted by Mr. Aney that the disputed facts cannot be decided in a writ petition. Mr. Aney further submitted that this petition suffers from delay and laches. Mr. Aney further submitted that in the advertisement given in the newspaper, there was no reference to minimum reserve price at all. Even if there is change effected in the minimum reserve price, the same was done in the present of all the tenderers present there. Inspite of the same, the petitioners did not put up their bid. In view of this, no relief is required to be granted. He submitted that there is no arbitrariness on the part of respondent No.1. The action of the first respondent is reasonable as per the test of Wednesbury principles on unreasonableness. Mr. Aney further submitted that in this view of the matter, the ultimate decision cannot be challenged in writ proceedings. It is submitted that the decision making process is not vitiated in any manner. It is submitted that the action of awarding contract to respondent No.3 is just and proper. Mr. Aney submitted

that considering the facts and circumstances, this Court may not entertain this petition as the petitioners have not filed the same with a bona fide intention.

9. Mr. Janak Dwarkadas, learned counsel appearing for respondent No.3 has submitted that respondent No.3 has already deposited Rs. Five crore as security deposit as per the tender conditions. Pursuant to the award of tender, the contract has been executed on 6th August, 2008 and respondent No.3 has also entered into contracts with various companies for displaying their advertisements on the said kiosks and substantial costs have been incurred by respondent No.3. This petition is filed only to harass respondent No.3 simply because respondent No.3 has not supported the petitioners at a subsequent stage though initially all of them were of the opinion that the minimum reserve price should be reduced. He has submitted that in view of delay and laches, the petition is required to be dismissed. He submitted that the condition about minimum reserve price of Rs. 33 crores is mentioned only for the first time in the tender form. It is therefore, submitted that the petitioners have no locus to file the present petition in view of the fact that the petitioner have not participated or submitted their tenders. Since respondent No.3 has entered into contract with third parties for displaying their advertisements, the petition be dismissed with costs. Mr. Dwarkadas cited various judgments of the Supreme Court to substantiate his say that the High Court should not

interfere in such matters. He has further submitted that even though there is allegation of mala fide against the General manager and other Officers, they have not been joined in the petition and, therefore, the allegation in this behalf cannot be entertained against such officer without joining him as party respondent.

10. We have heard the learned counsel appearing for the parties at length. We have gone through the record and proceedings and also considered the contentions raised by the parties. The principal questions which require consideration is (i) whether it was open for the first respondent to accept the tender of respondent No.3 below the minimum price which was mentioned in the tender form, (ii) whether the petitioners have been able to substantiate their case that after allowing them to leave the hall the tender of respondent No.3 was accepted after extending the time, (iii) whether there is any arbitrariness or illegalities in the decision taking process on the part of respondent No.1; and (iv) whether the petitions suffer from delay and laches.

11. So far as the petitioners in Writ Petition Nos. 1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008 are concerned, they have raised an additional point about blacklisting the said petitioners on the ground that they have formed a cartel and, therefore, they have been blacklisted. The said decision is challenged by the said petitioners on the ground that no order of

blacklisting could have been passed without affording them an opportunity of hearing. The impugned order blacklisting them is unreasonable and arbitrary.

12. So far as the question about prescribing minimum reserve price of Rs. 33 crores is concerned, it is not in dispute that in the advertisement there was no such reference . That condition is finding place in the tender form. As pointed out earlier, the tender forms were purchased by 15 tenderers. However, only four tenderers were responded with the payment of earnest money deposit on the relevant day. In the affidavit in reply filed on behalf of respondent No.1 at page 100, it is averred as under.

> "(i) The license to affix kiosk on street lighting pole are in existence since from 1.4.1998. The original contract was with M/s. Vantage Advertising for about 1 ½ years. Thereafter, it was with M/s. Mid-Day Publications Ltd. for about 3 years, and thereafter it was with M/s. D.S. Mittal for about 1 year. Thereafter since from 3.3.2004 the said license to affix kiosk on street lighting pole is with M/s. Prithvi Associates. I say that the original period of the said license was only for three years, but however the said license has been now extended for over 1 ½ years and will now expire on 02.09.2008. It may be noted here that even though the reserve price in the earlier contracts, including the contract with M/s. Prithvi Associates, was for Rs. 22 crores, the best offer received by BEST Undertaking was only Rs. 10.59 crores. Thus, the contract for the last 4 ½ years is pegged at the original rate. The extension granted in favour of M/s. Prithvi Associates has been at the behest of the petitioner, as would be clear from the following:-
>
> (ii) I say and submit that even in the previous contract which is expiring on 2.9.2008, the reserve price was Rs. 22 crores whereas the BEST undertaking could get the best offer for Rs. 10.59 crores, as such, upon getting approval from the BEST Committee the earlier contract was granted in favour of

Prithvi Associates for Rs. 10.59 crores even though reserve price was Rs. 22 crores. I say that the said contract was already extended twice and the said extended period is expiring on 2.9.2008.

(iii) Prithvi Associates being the beneficiary of the license at present, and being actively assisted in their stratagem by the Petitioners, are instrumental in creating a cartel in the tendering process initiated on 24.07.2008. The sole attempt and motive of the Petitioners and Prithvi Associates is to frustrate the tender process and consequently, get the existing license extended. I say that the present petition apparently filed at the instance of the said Prithvi Associates and therefore, the Petitioners have no locus standi."

It is also further averred in the affidavit in reply at pages 102 and 103 as under:

" C- Delay and latches: I say that the bidding was closed on 24.07.2008 at 5.05 p.m. I say that the 3rd Respondent's bid was recommended to the BEST Committee on 28.07.2008 by the note to the BEST Committee, Exhibit-D to the petition. Thereafter, the BEST Committee resolved to grant the contract in favour of Respondent No.3 vide its Resolution No. 216 dated 29.7. 2008. The contract document in favour of the 3rd Respondent has been already executed on 6.8.2008. I say that the present petition has been filed on 20.8.2008 and was served upon the BEST, the 1st Respondent on 25.08.2008. I say the Petition is therefore highly belated an stands defeated by delay and latches and on this count alone, the petition shall liable to be dismissed.

D- False Statement on oath by the Petitioners: I say that petitioner knowingly made false and incorrect statements as to the events of tendering. An attempt has been made by the Petitioners to put false words to my mouth. I say that I never stated that there will be re-tendering. On the contrary, I have requested all the eligible bidders and their representatives that matter will be decided on the same day and time to drop the bid will be extended with the approval of the General Manager, BEST and upon extension of time, the same has been duly communicated to all the eligible bidders, and they were all told to make their best offer. Only Respondent No.3

> chose to put in his best offer. Thereafter the sole tender bid was opened in the presence of representatives of all the four (4) bidders and I announced the respondent No.3's bid. I requested all the representatives of 4 bidders to sign the Tender Opening Report. They were all present at the tender opening hall till 5.05 p.m. Out of the representatives of four eligible bidders, two representatives of eligible bidders counter-signed the Tender Opening Report sheet along with various other officers of the BEST undertaking. The Petitioner and Prithvi Associates refused to sign and left the venue..."

13. It is further averred that the tender was opened in the presence of all the representatives of the four eligible bidders and after opening the tender box, sealed envelope of the bid dropped by respondent No.3 was opened in the presence of all the parties and the highest bid of respondent No.3 was announced in the open hall in the presence of all the representatives of the parties. The presence of the Officers is also mentioned in the reply at page 105. As per the averments at page 106 of reply of respondent No.1, the BEST Committee awarded the contract in favour of respondent No.3 vide letter dated 30th July, 2008, inter alia, granting license to display kiosks on electric poles and non-illuminated display board for the period between 3rd September, 2008 and 2nd September, 2011. Respondent No.3 had already deposited the security deposit of Rs. 5 crores vide letter dated 30th July, 2008, towards execution of the contract. Regarding giving contract below minimum reserve price, averments have been made in para 5 of the reply of respondent No.1 which reads thus:

" 5. I say that the license to affix kiosk on street lighting

poles is a revenue generating contract and there is no expenditure involved to the BEST Undertaking, as such, to entice higher bid, the reserve price has been quoted at higher rate with a hope to get best offer from the intending bidders and it is the practice all along and even in the earlier tender, though reserve price was Rs. 22 crores, contract was ultimately executed in favour of M/s. Prithvi Associates for Rs. 10.59 crores. I say that it was not the practice nor is the BEST Undertaking prevented from accepting any best offer, even though it is less than the reserve price. I say that the Petitioner is fully aware of the aforesaid fact, and I had in fact announced the prospective bidders present that their best offers will be considered. The reserve price could not therefor be a factor for not submitting the tender. I say that the license to affix kiosk on street lighting pole is in existence from 1.4.1998 and since then, none of the parties have ever matched the reserve price. In almost all revenue generating contract of BEST Undertaking, the reserve price is always higher than the rate at which the contract is finally awarded. In any case, so long as the process of award of contract is transparent, it is solely for BEST Undertaking to decide if it will accept the best offer, or readvertise the contract."

14. Mr. Aney submitted that the initial contract was given to M/s. Prithvi Associates was to expire on 2nd September, 2008 and considering the urgency in the matter, the tenderers were permitted to put their own bid as all the tenderers had made the grievance about the minimum reserve price. So far as the factual aspect is concerned, as pointed out earlier, on the relevant day only four tenderers were present. The queries of the tenderers were replied to by the first respondent. The representatives of the tenderers who were present informed that they were not interested in responding to the tender. It is required to be noted that there is nothing on record to show that the petitioners thereafter had made any grievance in this

behalf in any manner. It is not in dispute that the representative of the petitioners in Writ Petition No. 1997 of 2008 put his signature on the report prepared by Respondent No.1 on the relevant day at the time when the tender of respondent No.3 was opened. It is, therefore, clear that the petitioners have tried their best to stall the entire process and the real beneficiary of the same was M/s. Prithvi Associates. In our view, therefore, if in the presence of all the tenderers the time was extended from time to time on the relevant day, it cannot be said that respondent No.1 acted in an arbitrary manner. It is not possible for us to decide the disputed question whether the assurance was given by the concerned Officer to the petitioners that fresh tenders will be invited or otherwise. On the contrary, the fact that the representative of respondent No.3 has put his signature speaks otherwise. It is obvious that the story put forward by the petitioners about the so-called assurance is nothing but an after-thought. It is also further required to be noted that at least when the representative of the petitioners knew about acceptance of tender of respondent No.3, there was no reason why immediate grievance was not made at all in this behalf. It is, therefore, not possible to believe that the petitioners were not aware on that very day that the tender of respondent No.3 is accepted. Yet, for the reasons best known to them, immediate steps were not taken to challenge the award of contract to respondent No.3.

15. We are also not impressed by the argument of Mr. Naidu that

further information was sought for under the Right to Information Act as ultimately if any delay is caused in accepting the tender of respondent No.3, M/s. Prithvi Associates would have continued to get the benefit of the earlier contract which was awarded to them almost less than 50 per cent of the minimum reserve price at the relevant time. The petitioners accordingly after forming cartel did not allow the tender to proceed further and did not participate in the tender process only with a view that the minimum reserve price should be reduced so that ultimately contract can be awarded to them at a low rate. Considering the aforesaid factual matrix, in our view, it cannot be said that acceptance of the bid of respondent No.3 suffers from any vice of arbitrariness and unreasonableness. Considering the facts of the case, it cannot be said that Wednusburys principles of unreasonableness is attracted in the present case. In the facts of the case and as per the documents available on record, we find that the action of respondent No.1 cannot be faulted on the ground of any arbitrariness or unreasonableness.

16. As pointed out earlier, the contract awarded to M/s. Prithvi Associates which was initially for three years was extended for a period of one and half years in the same rate i.e. 10.59 crores. The same was to expire on 2nd September, 2008. At the cost of repetition, we may also reiterate that even for the earlier period of contract, the minimum reserve price was fixed at Rs. 22 crores but on the basis of the best offer available at that point of time, the contract was awarded M/s. Prithvi Associates at Rs.

10.59 crores for extended period. At that time, nobody had made any grievance in this behalf and at least M/s. Prithvi Associates very well knew that on the basis of best offer given last year, they were awarded contract only at Rs. 10.59 crores which was below the minimum reserve price. It is, therefore, not open for M/s. Prithvi Associates now to make any grievance in this behalf especially when all these petitioners themselves were not willing to offer any best price over and above the minimum reserve price and all the time an attempt was made to reduce the price below the minimum reserve price. It is required to be noted that even though during the course of hearing, Mr. Naidu, appearing on behalf of petitioners in Writ Petition No. 1853 of 2008 shown willingness on behalf of his clients to increase the bid to Rs. 34 crores and an affidavit to that effect has also been filed. It is pertinent to note that these petitioners have not even challenged the order of blacklisting them. In this view of the matter, even if all the four tenderers are required to participate again to offer bids, naturally these petitioners can never take part in the auction proceedings. It is, therefore, clear that these petitioners are interested in helping the petitioners in other writ petitions. Since Prithvi Associates have not filed petition at the earliest, though one of them is the signatories at the time of acceptance of the tender in question, and others had taken advantage of getting contract below the minimum reserve price, naturally now they are trying to build up their castle with the help of other petitioners.

17. Looking to the conduct of the petitioners and looking to the factual aspect of the matter, in our view no relief can be granted to the present petitioners. It cannot be disputed that the petitioners have tried to form a cartel and insisted for reducing the minimum reserve price and as per the say of the first respondent, they were also asked to give their bid, still they have chosen not to put their bid. Considering the factual scenario, in our view, it cannot be said that the first respondent has committed any procedural error or acted arbitrarily in reaching the conclusion of awarding the contract to respondent No.3 whose bid was found to be double than which was granted last year to the petitioner in Writ Petition (L) No. 2111 of 2008.

18. The learned counsel for the petitioner relied upon the decision of the Supreme Court in the case of *Ramana Dayaram Shetty* vs. *The International Airport Authority of India and others,* AIR 1979 SC 1628. In the aforesaid case, tenders were invited for putting up and running a second class restaurant and two snack bars at the International Airport at Bombay. The tender notice stated in clear terms that "sealed tenders in the prescribed form are hereby invited from registered second class hoteliers having at least 5 years experience for putting up and running a second class restaurant and two snack bars at this Airport for a period of three years. The Supreme Court after considering the facts of the case held in the said judgment that only a person running a registered second class hotel or

restaurant and having at least 5 years experience as such should be eligible to submit a tender. This was a condition of eligibility and it is difficult to see how this condition could be said to be satisfied by any person who did not have five years experience of running a second class hotel or restaurant. Pertinently, however, the Supreme Court in para 35 of its judgment held thus:

> "35.... Moreover the writ petition was filed by the appellant more than five months after the acceptance of the tender of the 4th respondent and during this period, the 4th respondents incurred considerable expenditure aggregating to about Rs. 1,25,000/- in making arrangements for putting up the restaurant and the snack bars and in fact set up the snack bars and started running the same. It would now be most inequitous to set aside the contract of the 4th respondents at the instance of the appellant. The position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of the 4th respondents but the appellant allowed a period of over five months to elapse during which the fourth respondents altered their position. We are, therefore, of the view that this is not a fit casein which we should interfere and grant relief to the appellant in the exercise of our jurisdiction under Article 226 of the Constitution."

19. So far as the facts of the present case are concerned, it is required to be noted that there was no reference of minimum reserve price in the advertisement, which fact is not in dispute. The said condition was forming part of the tender form and as stated above only 15 persons purchased the tenders and out of which only four tenderers were present on the relevant day. If the four tenderers can be said to have been told at the

time of opening of tender that they can put their own best bid, it cannot be said that the said procedure adopted by the first respondent can be said to be arbitrary as those who are likely to be affected by any such change knew very well that a relaxation was given in the minimum reserve price and they were permitted to put their own bid. If it is held that the four tenderers were told at the time of awarding the tender to respondent No.3, they cannot turn around and challenge the procedure adopted by respondent No.1 in this behalf.

20. Mr. Naidu has also relied upon the decision of the Supreme Court in the case of *M/s. G.J. Fernandez vs. State of Karnataka and others,* AIR 1990 SC 958, wherein it has been held by the Supreme Court that the tenderers could be excluded from consideration for failure to supply required documents. The Supreme Court has held that the supply of documents as per para V of notification inviting tenders was also a pre-condition for supply of tender books along with requirements of para 1 thereof. It has also been held that the authority inviting tenders can relax the qualifications but the said relaxation should not be arbitrary. In paragraph 16 of the said judgment it has been held that a deviation can be made from the guidelines but it should not result in arbitrariness or discrimination. In our view, in the instant case since all the tenderers were present at the relevant day were informed to give their own bid, it cannot be said that they were taken by surprise in any manner and change of tender conditions regarding minimum reserve price

can be said to have been altered as the same was within the knowledge of all the four tenderers who were present on the relevant day. It is not possible for us to believe that after the three petitioners left the site that surreptitiously tender of respondent No.3 was accepted especially when signatures of representative of one of the petitioners i.e. Petitioner in Writ Petition No. 1997 of 2008 is finding place.

21. The learned counsel for the petitioner has also relied upon the judgment of the Supreme Court in the case of *M/s. Delhi Rohtas Light Railway Company Limited vs. District Board, Bhojpur and others,* on the delay and laches . The Supreme Court has held that so far as belated and stale claim is concerned, it is not a rule of law but a rule of practice based on sound and proper exercise of discretion. The real test to determine delay in such cases is that the petitioner should come to the writ court before a parallel right is created and that the lapse of time is not attributable to any laches or negligence.

22. Mr. Naidu has further submitted that when tenders were invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. Reliance in this connection is placed on the judgment of the Supreme Court in the case of *Reliance Energy Limited and another vs. Maharashtra State Road Development Corporation Limited and another,* (2007) 8 SCC 1. The Supreme Court has held that the legal certainty is an

important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may even violate doctrine of level playing field. In matter of judicial review the basic test is to see whether there is any infirmity in the decision making process and not in the decision itself. The decision maker must understand correctly the law that regulates his decision making power and he must give effect to it otherwise it may result in illegality. Thus the question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness.

23. In *M/s. Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and others,* AIR 2000 SC 2272 , the Supreme Court has held that the rules of the game cannot be changed after the game had begun and, therefore, if the Government or the Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. So far as the facts of the present case is concerned, since so-called deviation is made within the knowledge of all the players of the game, no fault can be found with the procedure adopted by respondent No.1.

24. Regarding maintainability of the writ petition, learned counsel has relied upon the decision of the Supreme Court in the case of *ABL International Ltd. And another vs. Export Credit Guarantee Corporation of India limited and others,* 109 (2004) Delhi Law Times 415 (SC), wherein the Supreme Court has held that writ petition is maintainable in an appropriate case against the State or instrumentality of State arising out of contractual obligation and merely because some disputed questions of facts arise for consideration, the same cannot be a ground to refuse to entertain a writ petition as a matter of rule.

25. Mr. Naidu has also relied upon a decision of this Court in the case of *Konark Infrastructure Pvt. Ltd., Ulhasnagar vs. Commissioner, Ulhasnagar Municipal Corporation and others,* AIR 2000 Bombay 389. In the said case this Court held that a distinction must be made between those terms and conditions of tender which are essential terms of eligibility and on the other hand those which are of an incidental or inconsequential nature. Even if the tender conditions were to be relaxed hereafter, the benefit of relaxation could not have been made available only to the existing bidders since the relaxation operated to widen the field of eligibility and competition. In the instant case, according to the learned counsel for the petitioners, the first respondent has acted in an arbitrary manner and have abused the powers vested in them and that the action of awarding the tender to respondent No.3 is highly arbitrary. However, considering the facts of the present case,

as indicated above, it is not possible to accept the said contention as ultimately the benefit of relaxation was made available to all the tenderers who were present and it is not possible for us to accept the submissions of the petitioners that they were orally asked to leave the hall and thereafter bid of respondent No.3 was accepted after the prescribed time.

26. It is well settled that the relief under Article 226 is discretionary, and one ground for refusing relief under Article 226 is that the petitioners have filed the petition after the delay for which there is no satisfactory explanation. Reliance in this connection is placed by the learned counsel for respondent No.3 in the case of *Durga Prasad vs. The Chief Controller of Imports and Exports and others,* AIR 1970 SC 769. The Supreme Court in the said case has quoted the observations of Gajendragadkar, C.J. in *Smt. Narayani Debi Khaitan vs. State of Bihar* thus:

> " It is well settled that under Article 226, the power of the High Court to issue an appropriate writ is discretionary. There can be no doubt that if a citizen moves the High Court under Article 226 and contends that his fundamental rights have been contravened by any executive action, the High Court would naturally like to give relief to him, but even in such a case, if the petitioner has been guilty of laches, and there are other relevant circumstances which indicate that it would be inappropriate for the High Court to exercise its high prerogative jurisdiction in favour of the petitioner, ends of justice may require that the High Court should refuse to issue a writ. There can be little doubt that if it is shown that party moving the High Court under Article 226 for a writ is, in substance, claiming a relief which under the law of limitation was barred at the time when the writ petition was filed, the High Court would refuse to

> grant any relief in its writ jurisdiction. No hard and fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is a matter which must be left to the discretion of the High Court and like all matters left to the discretion of the Court, in this matter too discretion must be exercised judiciously and reasonably."

27. As regards acceptance of bids below the reserve price, the learned counsel for respondent No.3 has relied upon the judgment of the Delhi High Court in the case of *Gulmarg Restaurant vs. Delhi Development Authority,* 119 (2005) Delhi Law Times 648 (DB). The Delhi High Court observed thus:

> " 25. No doubt certain illustrations were given of other auctions, where the bids below the reserve price have been accepted. This is, however, a power to be exercised by the competent authority. In case it is found that there is no possibility of the reserve price being achieved dependent on the market conditions, the capital of the DDA would remain blocked. It is open to the DDA to confirm such an auction bid. This cannot be said to form a uniform principle for determination of cases without reference to the facts of the case."

28. Mr. Dwarkadas has also relied upon the decisions of the Supreme Court in the cases of (i) *The Dharangadhra Chemical Works Ltd. vs. State of Gujarat and others,* AIR 1973 SC 1041, (ii) *Dr. J.N. Banavalikar vs. Municipal Corporation of Delhi and another, AIR 1996 SC 326, (iii) Maharashtra State Road Transport Corporation vs. Balwant Regular Motor Service, Amravati and others,* AIR 1969 SC 329 and (iv) a Division Bench decision of this Court in

the case of *Pioneer Publicity Corporation vs. Maharashtra State Road Development Corporation and others in Writ Petition (Lodging) No. 3141 of 2005, decided on 17th January, 2006.*

29. At this stage it is necessary to note the observations of the Supreme Court in the case of *Tata Cellular vs. Union of India,* AIR 1996 SC 11 in paras 93,94 and 95 as under:

> " The duty of the court is to confine itself to the question of legality. Its concern should be :
>
> 1. whether a decision-making authority exceeded its powers?
> 2. Committed an error of law.
> 3. Committed a breach of the rules of natural justice.
> 4. Reached a decision which no reasonable Tribunal would have reached or
> 5. abused it powers.
>
> 94. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
>
> (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
> (ii)Irrationality, namely Wednusbury unreasonableness.
> (iii)Procedural Impropriety.
>
> 95. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R.V. Secretary of State for the Home Department ex pate Brind,(1991) 1 AC 696, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be applied is that the Court should, 'consider whether something

> has gone wrong of a nature and degree which requires its intervention.'

The Supreme Court has also considered the question of irrationality. It has been further held in para 98 as under.

> " At this stage, the Supreme Court Practice 1993 Volume 1 pages 849-850, may be quoted.
>
> "4. Wednesbury principle – a decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it"

In our view, considering the factual aspect of the matter, it cannot be said that the action of the first respondent is liable to be quashed on the ground that they have not acted reasonably or no reasonable person can reach to the conclusion which it has reached. Taking an overall view of the matter, it is not possible for us to hold that the decision arrived at by respondent No.1 is unreasonable, arbitrary and capricious. At the cost of repetition, we may say that except four tenderers, no other tenderers were present on the relevant day and no fault can be found on the procedure adopted by the first respondent.

30. In this connection, reference is also required to be made in the decision of the Supreme Court in *B.S.N. Joshi and sons Ltd. vs. Nair Coal Services Ltd. and others,* (2006) 11 SCC 548, wherein while considering the aspect about relaxation of the requisite conditions, the Supreme Court observed in paras 66 and 69 thus:

> " We are also not shutting our eyes toward the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:
>
> (i) if there are essential conditions, the same must be adhered to;
> (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
> (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
> (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
> (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purpose and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
> (vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii)where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/ or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."

In the instant case once it is held that the deviation in the minimum reserve price has been carried out in the presence of all concerned who were present on the relevant day, and the same was not a part of the condition in the advertisement itself and considering the fact that even in the past there was a precedent and practice to accept the bid below the minimum reserve price, the decision of the first respondent cannot be faulted.

31. Considering the principles laid down in Tata Cellular (supra) as

well as considering the facts and circumstances of the case, we do not find any error on the part of the first respondent in awarding the contract to respondent No.3. Even otherwise, disputed questions of fact which the petitioners tried to raise cannot be decided by this Court when the representative of petitioners in Writ Petition No. 1997 of 2008 was already present and put his signature on the report, still no attempt was made by the petitioners to challenge the said action for a considerable period of time.

32. Taking an overall view of the matter, we are of the opinion that it cannot be said that the petitioners were not aware on the relevant day regarding permitting each of the tenderers to submit their offer. We are not impressed by the fact that the representative of petitioners in Writ Petition No. 1997 of 2008 signed the report of respondent No.1 in view of misrepresentation. However, during the course of hearing Mr. Dwarkadas has fairly submitted that his client is ready to revise the bid to Rs. 33 crores for which an affidavit has also been filed. The petitioners in Writ Petition No.1853 of 2008 have also shown their willingness to bid at Rs. 34 crores. The other tenderers have also shown their willingness to increase the bid amount between Rs. 33 and 34 crores and filed affidavits to that effect. So far as the petitioner in Writ Petition No.1853 of 2008 is concerned, it is required to be noted that even though they have also been blacklisted by subsequent order and even though the matter was adjourned from time to time, no amendment was brought on record challenging the blacklisting

order. The other petitioners have taken that point in their writ petitions. In that view of the matter, we find substance in the argument of Mr. Aney that the petitioners in Writ Petition No. 1853 of 2008, are not really interested in taking part in the bid but filed the petition at the behest of other petitioners. So far as the question about blacklisting is concerned, in our view, this is not sustainable as no hearing has been afforded to the petitioners. Therefore, blacklisting of the petitioners in Writ Petition No. 1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008 is concerned, the said decision is required to be set aside. In this connection, a reference can be made to the decision of the Supreme Court in the case of *Joseph Vilangandan vs. The Executive Engineer (PWD), Ernakulam and others,* (1978) 3 SCC 36, which dealt with the case of blacklisting of a contractor in Government contracts. The Supreme Court has quoted the observations of the Supreme Court in the case of *Erusian Equipment and Chemicals Ltd. vs. State of West* Bengal, (1975) 1 SCC 70 , which reads thus:

> "Blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the black list."

33. Considering the said aspect, though we dismiss writ petitions so far as acceptance of tender of respondent No.3 is concerned, the Petitions

are required to be allowed in so far as it relates to the decision of blacklisting the petitioners of Writ Petition Nos. 1997 of 2008 and Writ Petition (L) No. 2111 of 2008.

34. So far as blacklisting of the petitioners is concerned, we are of the opinion that the General Manager of the first respondent should not have passed the said order without giving reasonable opportunity of hearing. No order which may cause civil consequences can be passed without reasonable opportunity of hearing. The General Manager was expected to have acted in a fair and reasonable manner. In any case, the orders regarding blacklisting the petitioners are not at all sustainable and, therefore, the same are set aside. The first respondent can take appropriate decision in this behalf after hearing the concerned petitioners as to whether they are required to be blacklisted or not for future contracts.

35. Before parting with this matter, we would like to observe that in the instant case, since the original period of the said license was only for three years, the said license was subsequently extended for one and half years which expired on 2nd September, 2008. In future, as and when the period is likely to be over, at least an attempt should be made six months in advance to re-invite the fresh bids so that at the time when the contract comes to an end, the person whose tender is accepted can be given the contract without resorting to the extension given to the earlier contractor. In

future, respondent No.1 is directed to act accordingly and start the process at least before six months in advance in relation to the tenders before the expiry of the contract period. Now the third respondent has agreed to revise its bid to Rs. 33 crores and shown willingness to accept the contract at the said rate and an affidavit to that effect has also been filed and in view of the stand taken by third respondent, which takes away the rigors of the difference in the accepted bids and minimum reserve price, respondent No.1 is directed to revise the contract given to third respondent to Rs. 33 crores instead of Rs. 21 crores and execute appropriate fresh order in this behalf within a period of two weeks from today. Needless to say that the proportion of yearly payments would also be on the same basis as per the tender document.

36. In view of what is stated above, writ petition No. 1853 of 2008 is dismissed.

37. So far as Writ Petition Nos. 1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008 are concerned, they are partly allowed only in connection with the blacklisting part of the order. That part of the order is quashed and set aside and the first respondent is directed to pass appropriate order in accordance with law after giving an opportunity of hearing to the concerned petitioners in this behalf.

38. Rule is discharged in respect of Writ Petition No. 1853 of 2008. Rule is partly made absolute in respect of Writ Petition No. 1997 of 2008 and Writ Petition (Lodging) No. 2111 of 2008. Ordered accordingly.

P.B. MAJMUDAR, J.

A.A. SAYED, J.