

JCDECAUX Advertising India Pvt. Ltd

v.

Times Innovative Media Ltd. and Others

(Supreme Court Of India)

HON'BLE MR. JUSTICE T.S. THAKUR HON'BLE MR. JUSTICE
VIKRAMJIT SEN

Special Leave Petition (Civil) No. 17325 Of 2013. With Slp(C) No. 17470 Of
2013 (Govt.Of Nct Of Delhi And Another Times Innovative Media Ltd.And
Another) | 03-01-2014

T.S. Thakur and Vikramjit Sen, JJ.—

1. This Petition has been filed by JCDECAUX Advertising India Pvt. Ltd., Respondent no.3 in Writ Petition (C) No.3973 of 2012, which came to be decided in favour of Times Innovative Media Ltd., the Writ Petitioner before the High Court of Delhi and Respondent no.1 before us. In essence, the impugned Judgment dated 2.4.2013 contains the conclusion that the Authorities had not acted reasonably and in accordance with the relevant Rules by resorting to the process of nomination for the award of the contract in question, which was for upgradation of 319 Bus Queue Shelters (BQS) and installation of 100 new BQs in fresh locations across Delhi, and for their operation, maintenance and marketing advertisement spaces for a period of 20 years (extendable by 5 years).

2. Shri Gourab Banerjee, learned Additional Solicitor General appears for the Government of NCT of Delhi in S.L.P.(C)No.17470 of 2013 which also assails the aforementioned decision of the Division Bench of the High Court of Delhi. Briefly stated, it is the contention of Shri Banerjee that several attempts have been made in the past by the Government of NCT of Delhi for entering into contracts for the erection and maintenance of BQs in Delhi, but previous experience has proved to be entirely futile. Even where contracts had been executed, the concerned parties had walked out of their obligations. Meanwhile, the Government had felt a pressing need for the erection of BQs and their subsequent maintenance, which is only possible by sharing revenue from

advertisements that the successful party would be able to garner from the public. It has been explained by Shri Banerjee, learned Additional Solicitor General that keeping these annals in view, and also the global reputation of JCDECAUX Advertising India Pvt. Ltd. in perspective, it was thought appropriate by the Govt. of the NCT of Delhi to directly enter into a contract with the said company without resorting to the usual tender process, which by past experience was certain to lead to gross delays and the likelihood of not evincing genuine interest in the market.

3. Respondent no.1 in both the Special Leave Petitions, namely, Times Innovative Media Pvt. Ltd. (the Writ Petitioner before the High Court) has appeared before us and has endeavoured to support the impugned Judgment. On the contrary, JCDECAUX has submitted, in reiteration of the stance it adopted in the High Court of Delhi, that it has similar operations in over thirty countries and is desirous of honouring even unremunerative contracts in order to build and protect its global reputation.

4. However, in the course of the protracted hearings before us, all three contesting parties had arrived at a consensus that it would be legal, expedient and just for this Court to conduct an auction inter parties. We harboured some doubts as to whether such a course, which avowedly is salutary and expedient, would be legally proper. However, learned Additional Solicitor General as well as Dr. Singhvi, learned Senior Counsel appearing for the Petitioner- JCDECAUX Advertising India Pvt. Ltd., Shri C.A. Sundaram and Shri Parag Tripathi, learned Senior Counsel for Respondent no.1, have submitted in unison that in the circumstances of the case it would be perfectly legal to conduct an auction between JCDECAUX Advertising India Pvt. Ltd. and Times Innovative Media Ltd. since the contractual as well as jural history is indicative of the position that there are no other genuinely serious parties which are interested in the subject matter of the contract. We are also satisfied that the factual matrix of the matter justifies our invoking the powers under Article 142 of the Constitution of India.

5. As a prelude to our conducting the auction we had directed furnishing of Bank Guarantee/Performance Security in a sum of Rs. 10 crores, which would be valid initially for a period of six months and would be encashable on our directions. This was so devised in order to ensure that neither of the parties

would be frivolous or irresponsible or adventurous in participating in the Court auction. On behalf of JCDECAUX Advertising India Pvt. Ltd. an undertaking has been furnished and on behalf of Times Innovative Media Ltd., a Bank Guarantee for the aforementioned sum of Rs. 10 crores has been duly furnished. There is no controversy on this score.

6. The parties had agreed to the following terms as the fundamental premise for the auction. This was necessary in the event that Times Innovative Media Ltd. emerged as the successful party in the auction; and to conclusively conclude all postula litigation between all three contestants before us. These read as follows:

"A. REIMBURSEMENT OF CAPITAL EXPENDITURE IN RESPECT OF 21 NEW BUS QUEUE SHELTERS (BQS)

TIML, if successful in its bid, shall pay (JCD, the actual cost incurred for construction of new BQs).

(a) Procedure for arriving at the cost of construction

TIML will pay JCD Rs. 9.5 lacs per BQS, being the cost of construction as per the CA certificate produced by JCD and its annexures (Page 860-861 of the SLP), in terms of which JCD has placed purchase orders / work orders for Rs. 9,50,09,353 in respect of 100 new BQS subject to assessment by an independent assessor / valuer of the actual cost incurred by JCD. The procedure to be followed by such assessor is set out separately below.

B. CAPITAL EXPENDITURE IN RESPECT OF UPGRADATION OF 319 EXISTING BUS QUEUE SHELTERS (BQS)

TIML, if successful in its bid, shall pay the actual cost incurred by JCD towards renovation / upgradation only of a permanent nature.

(a) Procedure for arriving at the cost of upgradation of permanent nature Assessment by an independent assessor / valuer of the actual cost incurred by JCD. The procedure to be followed by such assessor is set out separately below.

C. REVENUE EXPENDITURE

DTIDC / Government of NCT will reimburse to JCD the net operational / maintenance expenses incurred by JCD in relation to the 340 BQS till date, after adjusting the revenue earned from exploitation of the BQS by JCD. Any excess after adjustment will be made over to TIML.

The said figures will be reconciled based on the books of accounts of JCD by the GNCTD / DTIDC. In the event of any dispute, the matter shall be referred to an independent auditing agency, whose decision shall be final and binding between the parties.

D. PROCEDURE FOR VALUATION BY INDEPENDENT ASSESSOR

i) The independent assessor to be nominated by this Court. Suggestions of parties as regards assessors are separately annexed.

ii) Within 14 days of the appointment of the auditor, JCD is to submit its claim in respect of the construction of 21 new BQS and upgradation of 319 BQS of permanent nature with all supporting documents and evidence.

iii) Within 14 days thereafter, TIML to submit its statement of objections / comments to the assessor alongwith all documents and evidence.

iv) Immediately thereafter, the assessor to carry out a survey of the 340 BQS, giving notice to the parties.

v) GNCTD / DTIDC to render all assistance to the assessor including logistical assistance and supply of information, if so asked.

vi) Assessor to submit a report on actual cost of construction of 21 BQS and upgradation of permanent nature 319 BQS expeditiously, and in any event, within 60 days of submission of the objections.

vii) The report of the independent assessor to be final and binding on all the parties.

E. BIDDING / CONTRACT

(i) The contract to be executed will be on the same terms and conditions, as the contract 2.4.2012, signed and executed between JCD and DTIDC, subject to modifications in respect of Bank Guarantee, and consequential amendments regarding number of Bus Queue Shelters already constructed and to be constructed.

(ii) Both parties to submit their best offer through open bid.

(iii) In case, JCD fails to better the offer provided by TIML, contract be awarded to TIML and amounts mentioned in the report of the independent assessor, should be paid by TIML to JCD within 30 days of signing the agreement or making of the report, whichever is later.

(iv) No further claims, except as above, to be entertained against any of the parties.

F. BANK GUARANTEE / PERFORMANCE SECURITY

Article 3 of the contract dated 2.4.2012 provides for Performance Security in two parts. The said provision to be amended to provide for a performance guarantee of Rs. 10 crores, out of which Rs. 6 crores shall be to guarantee due and punctual performance of obligations in respect of construction of new BQSS and Rs. 4 crores for due and punctual performance of obligations in respect of existing BQSSs."

7. In the event, these conditions have been rendered superfluous for the reason that JCDECAUX Advertising India Pvt. Ltd. has made the highest bid, namely, an agreement for sharing of 39% (in betterment of the existing 16%) of the advertising proceeds or revenue with the Govt. of NCT of Delhi. Since JCDECAUX Advertising India Pvt. Ltd. is the successful party in the auction it is not necessary for us to spell out all the terms of the contract inasmuch as there are only two changes and modifications to the existing terms as contained in the Agreement dated 2.4.2012 executed between JCDECAUX Advertising India Pvt. Ltd and the Government of NCT of Delhi. Firstly, JCDECAUX Advertising India Pvt. Ltd. shall furnish a Performance Guarantee of a value of Rs. 10 crores. The Performance Guarantee shall be furnished to the Govt. of NCT of Delhi within four weeks from today. Secondly, as against the earlier agreement for disbursing 16% of the advertising revenues, JCDECAUX shall henceforward pay to the Govt. of NCT of Delhi 39% of the revenues earned from the BQSSs. We clarify that the said 39% shall not be in derogation of the minimum guarantee of Rs. 9,300 per month for each shelter with stipulated escalations as agreed upon in the existing contract. In other words, maximum liability of JCDECAUX Advertising India Pvt. Ltd. to the Govt. of NCT of Delhi shall be 39% of the revenues earned from the subject BQSSs subject to the minimum of Rs. 9,300 per month for each shelter, with escalations.

8. The modifications to the present contract between the Govt. of NCT of Delhi and JCDECAUX Advertising India Pvt. Ltd. have been carried out by us in exercise of powers under Article 142 of the Constitution of India. The Special Leave Petition is disposed of in these terms leaving the parties to bear their respective costs. S.L.P.(C) No.17470 of 2013.

9. In view of the order passed in S.L.P.(C)No.17325 of 2013, this Special Leave Petition also stands disposed of in the same terms leaving the parties to bear their respective costs.

