

IN THE HIGH COURT OF DELHI AT NEW DELHI

SUBJECT :

W.P. (C) 1727/2005, WP (C) 14294/2005, W.P. (C) 11850/2005,
W.P. (C) 2550/2005, W.P. (C) 1737/2005, W.P. (C) 12559/2006,
W.P. (C) 14661/2006

Reserved on : March 21, 2007

Decided on : June 8, 2007

1. W.P. (C) No. 1727/2005

DALIT MANAV UTHAN SANSTHAN ... Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with
Mr. N.K.Singh, Advocate

Versus

COMMISSIONER, MUNICIPAL CORPORATION OF
DELHI & ORS. ----- Respondent

Through: Mr. Raj Birbal, Sr. Advocate with
Mr. Sanjeev Sabharwal, Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

2. WP (C) No. 14294/2005

TEJ SHREE KHADI GRAMODYOG ... Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with
Mr. N.K.Singh, Advocate

Versus

MUNICIPAL CORPORATION OF DELHI & ORS. ----- Respondent
Through: Mr. Deepak Kumar Dhingra, Advocate for
Mr. Raj Birbal, Sr. Advocate with Mr. Gaurang Kanth,
Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

3. W.P. (C) No. 11850/2005

CHARANJIV PRABHAKAR ... Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with
Mr. N.K.Singh, Advocate

Versus

COMMISSIONER MCD & ORS. ----- Respondent

Through: Mr. Raj Birbal, Sr. Advocate with
Mr. Sanjeev Sabharwal, Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

4. W.P. (C) No. 2550/2005

VIJAY CATERERS ... Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with

Mr. N.K.Singh, Advocate

Versus

COMMISSIONER, MCD OF DELHI & ORS. ---- Respondent
Through: Mr. Raj Birbal, Sr. Advocate with
Mr. Sanjeev Sabharwal, Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

5. W.P. (C)No.1737/2005

SOCIETY FOR WEAKER'S EDUCATION &
REHABILITATION APPRENTICE (SWERA)Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with
Mr. N.K.Singh, Advocate

Versus

COMMISSIONER MCD & ORS. ---- Respondent
Through: Mr. Raj Birbal, Sr. Advocate with
Mr. Sanjeev Sabharwal, Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

6. W.P. (C)No.12559/2006

DHAMIJA CATERERS . .. Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate with
Mr. N.K.Singh, Advocate

Versus

COMMISSIONER MCD & ORS. ---- Respondent
Through: Mr. Deepak Kumar Dhingra, Advocate for
Mr. Raj Birbal, Sr. Advocate with Mr. Gaurang Kanth,
Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9
Mr. M.S. Vinaik, Advocate for the respondent.

7. W.P. (C)No.14661/2006

SUBHASH RANA Petitioner
Through: Mr. V.P. Chaudhary, Sr. Advocate
with Mr. N.K.Singh, Advocate

Versus

COMMISSIONER MCD & ORS. ---- Respondent
Through: Mr. Deepak Kumar Dhingra, Advocate for
Mr. Raj Birbal, Sr. Advocate with Mr. Gaurang Kanth,
Advocate for the MCD
Mr. Raman Duggal, Advocate for R-3
Mr. Rajesh Goyal, Advocate for R-9

Mr. Justice S. Ravindra Bhat:

1. These writ petitions question the decision of the Municipal Corporation of Delhi (MCD) awarding contracts for providing cooked mid-day meals to students of Primary schools in Delhi.

2. The Supreme Court of India, in the course of a Public Interest Litigation, being WP (C) No. 196/2001 People's Union for Civil Liberties-vs- Union of India, issued directions on 28.11.2001, regarding implementation of the "Mid-day-meal" scheme along with other welfare schemes of Central Government. The operative parts of those directions, concerning the State Government/Union Territories are as follows:

" We direct the State Government and Union Territories to implement the Mid-day-Meal scheme by providing every child in every Govt. and Govt. assisted Primary School with a prepared Mid-day-Meal with a minimum content of 300 calories and 8-12 gms. of Protein each day of school for a minimum of 200 days. Those governments providing dry rations instead of cooked meals must within three months start providing cooked meals in all government and government aided Primary Schools in half the districts of the state (in order of poverty) and must within a further period of three months extend the provisions of cooked meals to the remaining parts of the state."

"We direct the Union of India and FCI to ensure provision of fairly average quality grain for the scheme on time. The State/Union Territories and FCI are directed to do joint inspection of food grains. If the food grains is found, on joint inspection, not to be of fair average quality, it will be replaced by the FCI prior to lifting."

3. By orders of Chief Secretary, Govt. of National Capital Territory of Delhi (hereafter "GNCT") dated 3.06.2003, MCD was directed to make detailed arrangements for its schools as well as schools of Govt. of NCT of Delhi. Relevant extracts of the order reads as follows:

" This scheme would now be administered by 1st July so that in three months, it is possible to generate experience. Commissioner (MCD) indicated that he would also be able to take care of the Education Dte. Schools. Details have to be worked out in a spirit of getting things done. Problems have to be solved and not allowed to overtake the main objective of generating experience in Delhi."

4. The principal objectives of the schemes, contained in the guidelines for National Programme of Nutritional Support to Primary Education, 2004, issued by the Ministry of Human Resources Development, Department of Elementary Education & Literacy, Government of India in December 2004 are:

a) To boost universalisation of primary education (Class I -V) by improving enrolment, attendance, retention and learning levels of children, especially those belonging to disadvantaged sections.

b) To improve nutritional status of students of primary stage, and

c) To provide nutritional support of primary stage in drought affected areas during summer vacations also.

5. On 9-1-2003, an advertisement was issued by the MCD, calling for responses from persons interested, with complete details indicating the capacity and experience. The responses were to be forwarded to the Director (Pry. Edn.), Nigam Bhawan, Kashmere Gate, Delhi, by 29th January, 2003. The advertisement, published in newspapers, reads as follows:

"MUNICIPAL CORPORATION OF DELHI
MID-DAY MEAL BRANCH

No. D/DEO (MDM) /2003/317

Dated : 9.1.2003

SUPPLY OF COOKED MEAL TO CHILDREN

There is a proposal to provide cooked meal to approx. 9.50 lac children enrolled in schools run by the MCD including schools aided by MCD. These schools are located in various parts of the city under the jurisdiction of MCD. The cooked Mid-day-Meal is to be served for at least 200 days in a year which virtually means on all working days. The meal shall contain minimum of 300 K. Calories and 8-12 gm. Protein at the rate of Rs. 2/- per child per day (inclusive of cost of ingredients, cooking charges and other over-head expenses)

Proposals are invited from interested People/parent Teachers Associations, Women Empowerment Groups, Caterers, Voluntary Organisations (NGOs), institutions with considerable experience in providing cooked meal. The contract of supply of cooked Mid-day-Meal can be for a school or for a cluster of schools but the supply will have to be made at school level.

Soliciting the participations of those interested, proposals with complete details indicating the capacity and experience, are invited which may be forwarded to the Director (Pry. Edn.), Nigam Bhawan, Kashmere Gate, Delhi-110006 latest by 29th January, 2003.

R.O. No. 879/PIO/02-03

Addl. Director (West)"

6. Pursuant to the advertisement, responses were received and provision for cooked meals, in accordance with the directions of the Supreme Court, was made in 410 schools.

7. Yet another advertisement was issued, on 21-8-2003, which read as follows:
"MUNICIAPL CORPORATION OF DELHI
EDUCATION DEPARTMENT : HQ

No. D-78/DEO (MDM)/03

Dated 21.08.2003

APPLICATIONS ARE INVITED FROM SERVICE PROVIDERS FOR PROVIDING COOKED FOOD TO CHILDREN IN MCD SCHOOLS.

Education Department, Municipal Corporation of Delhi invites Expression of Interest for providing cooked food to children under Mid-day-Meal Programme. The scheme is already being run in approx. 400 MCD schools. Keeping in view, the encouraging response, MCD intends to cover all MCD schools in this scheme by the end of this financial year.

The cooked food shall be made of wheat or rice as per the prescribed parameters. Each child present the school shall be given food having 300 K. Calories and 8-12 grams of Protein for which the service provider shall get 100 grams of wheat/rice free of cost which shall be lifted from FCI godowns besides a payment of Rs. 2/- per child per day.

Parent Teacher Associations, RWA, NGOs, Women Empowerment Groups, owners of Canteens/Caterers, other institutions and individuals those who are interested to participate in the scheme and those who have already participated in the scheme in the past may contact Director (Edn), Old Hindu College building, Kashmere Gate, Delhi, Ph. No. 23967663 or the zonal Deputy Education Officers on all working days. For more information brochure can be obtained. Expression of interest for supply of cooked food in selected schools with their names can be filed with Director (Edn) or the zonal DEO latest by 29th August, 2003.

Bite : EOI shall be available on the following website upto the specified period.

www.tenderhome.com"

8. In the meanwhile, the MCD entered into arrangement with several Non-Governmental Organizations (NGOs) for the supply of mid-day meals, according to the scheme. The petitioners before this court were all parties to such agreements. These were entered into on various dates, between June 2003 and in some cases, continued till 31-3-05. In many instances, the arrangements ended on 31-12-2004. According to the understanding, the contracting party/ petitioner was to:

- 1) supply cooked meals of 300 K.Calories and 8-12 grams protein to the school specified in the contract. The items to be supplied were spelt out in a list.
- 2) Supplies were to be made by the contracting party in the school concerned, on each working day at 9:00 AM; in the case of a double shift school, the second supply was to be at 2:30 PM;
- 3) Variation beyond 5% entitled the MCD to deduct the payments, or refuse to take the supply; it could return the whole or part of the meal.
- 4) The food was to be given to children, if found to be fit for human consumption, as per the prescribed standard, and after tasting by a committee comprising of Head Master, teacher in-charge of the Mid-day-meal Scheme, a member of the Parent Teacher Association, a member of the Residents Welfare Association or Senior Citizen living in the vicinity.
- 5) To ensure hygienic standards of cooking inspection was entrusted to an independent agency, i.e. Nutrition Foundation of India. In case of adverse reporting by that agency, the MCD could discontinue the supplies, by giving seven days notice.

9. On 9-4-2004, MCD issued an advertisement in the newspapers, which contained an appeal to humanitarian institutions to make available 1 to 2 acres of land for establishment of automatic/ semi automatic kitchens on donation or rent basis. This read as follows:

"Generosity would be Deeply Felt

..... children studying in 1875 primary schools being run/aided by MCD relish cooked food. This is in compliance of an order of the Hon'ble Supreme Court.

In their continuing endeavour, NGOs have felt the need for LAND to establish a kitchen and ensure little stomachs enjoy a nutritious meal. MCD appeals to the kind hearts of humanitarian institutions, associations and individuals to make available One to Two acres of their land in Delhi for a noble gesture of establishing a kitchen.

The land shall be utilized only for establishing/running of Kitchen for such a period only till the scheme of cooked meals remains in operation. After that the land shall be handed back to its owner.

During this period of use of their land by NGOs the right of ownership of the land will rest with its bonafide owner.

Your generosity would be deeply felt by making the land available either free of cost or by charging a token rent.

For more details, you may please contact: Director (Primary Education), Education Department(HQ), Second Floor, Nigam Bhawan, Kashmere Gate, Delhi - 110006.

Ph: 23967663, 23967992

(Rakesh Mehta)
Commissioner
Education Department
MUNICIPAL CORPORATION OF DELHI"

10. In all the petitions, the common grievance articulated is that though initial contracts or agreements were entered into by the MCD, pursuant to the advertisements, in many cases, such arrangements were also extended from time to time, yet the MCD did not choose to renew the agreements and give a chance to them to compete and in stead, it entered into agreement with 11 specified agencies, to supply cooked meals for 5 years, through order dated 15.3.2005. This has been impugned on the following substantial grounds:

- a) No advertisement was issued calling for proposals from NGOs, interested in executing the work;
- b) The decision to award work for 5 years to the 11 parties was taken in an arbitrary, mala fide and discriminatory manner;
- c) Some of the agencies awarded the work, such as Stree Shakti, had been indicted, and were even subject of adverse press comment, for having supplied sub standard food during earlier periods;
- d) The report of the Nutrition Foundation of India was ostensibly sought to be used to exclude the petitioner's cases, whereas those given the contracts were awarded the same notwithstanding the fact that they were indicted.
- e) No criteria was indicated to the existing service providers nor were they asked to cure or rectify any deficiencies, or perceived shortcomings; they were not even given show cause notices. Instead, after extending the periods of contract/arrangements, the MCD merely discontinued their arrangements and through new or fresh arrangements, entered into contract with NGOs.
- f) The action of MCD, in disregarding the case of the petitioners, was also arbitrary, as it ignored their legitimate expectation to be continued as service providers, with the further right to be awarded contracts in the same terms as the 11 others who were awarded contracts.

11. The MCD, in these proceedings, filed its return. It avers that in compliance with orders of the Supreme Court, it started the mid-day meals scheme for children studying in all schools run/aided by it in a phased manner. The MCD resorted to out-sourcing and decentralization in view of the gigantic task and the sensitivity of the matter. For the first phase, Expressions of Interest were invited from NGOs/Caterers/ Women Empowerment Groups/ PTA/ Canteens/ Individuals etc in 19.01.2003. In response to the advertisement, 108 expressions of interest were received. Discussions were held with these NGOs/PTAs/ WEGs/ Individuals etc. on four occasions in the following months of implementing the scheme. 32 NGOs/ Service Providers were short listed keeping in view their financial capability, availability of sufficient infrastructure etc. Provision of cooked meal was started in 410 schools run/aided by MCD in July 2003. It is averred that in view of the encouraging response from children, Expressions of Interest were invited again on 21.08.2003 from NGOs/ Cateres/ Women Empowerment Groups/ PTAs/ Canteens/ Individuals etc. Those applications were invited zone wise with a view to decentralize the whole process. The work of providing cooked food to the children studying in school run/aided by MCD was entrusted to 52 NGOs/Service Providers by Zonal authorities. In the second phase of the programme, all the schools run/aided by MCD were covered under the scheme.

12. According to MCD, the Supreme Court's orders and guidelines issued by the Central Government, under the National Programme of Nutritional Support to

Primary Education, 2004, cooked meals with minimum 300 calories and 8-12 grams of protein content, was to be provided 200 days a year to all children studying in classes I-V in all Municipal and municipal aided primary schools. For the purpose it pays Rs. 2/- per child per day in addition to supply of free wheat/rice @

per 100 gram per child per day to be lifted by the suppliers, directly from the FCI godowns. The MCD alleges that during continuation of the scheme, it received complaints regarding cooked meals served to children by various NGOs/ Service Providers. Besides these, reports were received from Nutrition Foundation of India in which deficiencies were reported in the existing process of cooking and distribution of meals. In the light of those materials, the MCD decided to provide cooked meal to children by insisting on establishment of large semi automatic kitchens, to ensure soundness of quality of food.

13. The MCD avers that a major problem in supplying quality cooked mid day meals was lack of infrastructure with the service providers. Some kitchens were located near drains and toilets, and some had no drinking water facilities. It was also difficult to monitor the work of 50 or so NGOs/ Service Providers, functioning in a decentralized manner. There were reports of children falling ill, even though such reports did not confirm allegations of adulteration in food. In order, however, to provide fool-proof arrangements, MCD decided to consolidate the kitchens into a dozen or so, for easier monitoring of performance, and to set higher standards of health and hygiene. Expression of Interests were invited on 09.04.2004, appealing to Humanitarian Institutions, with 1 to 2 acres of Land for the establishment of Automatic/Semi-Automatic Kitchens on donation or rent basis to apply for the purpose. In response to this advertisement, 14 applications were received. A series of meeting were held with such 14 applicants. In view of exorbitant prices of land in Delhi, the efforts by MCD for getting donation of land for establishing semi automated kitchens did not yield the desired results. However, during the course of discussions, some applicants expressed their interest in using their land for establishing kitchen subject to the condition that they/their organizations be given the opportunity to establish semi automated kitchens for distribution of cooked meal to children.

14. The conditions specified for establishing the kitchens were:

I. They must be located on large areas of covered space so as to enable proper placement of various equipments required for Semi-automated kitchens like cooking gas pipeline, boilers/solar heating, vegetable cutting, masala grinding, washing utensils, disposal of waste, storage of raw materials etc. Also there had to be adequate space for moving around in the kitchen.

II. There had to be drinking water facility available at the site.

III. There had to be proper parking space for vehicle used for transporting cooked food to the schools.

IV. Special separate containers designed so that each class had a single container to ensure that children could eat simultaneously in the schools and thus save time.

V. The service provider should have had past experience in running kitchens and should have been rated well by the Nutrition Foundation of India (NFI).

VI. Preference was to be given to NGOs using Self Help Group of Women to enable them to cook for children and in the process empower them by making them economically sustainable.

15. Kitchens of all the existing NGOs/Service Providers providing cooked meal to children were inspected by Commissioner MCD, Director (Primary Education) and other officers in the month of February-March 2005 to ascertain the area of the

land, cleanliness of surroundings, healthy environment of the site where kitchens were to be established, as well as the infrastructure. It is averred that location of the kitchens was selected to ensure area-wise equitable distribution and having regard to number of children, depending on the number of schools that could be covered effectively after detailed site inspections. The following 11 NGOs/Service Providers were approved for providing cooked food to children by establishing semi-automated kitchens:

01. INDICARE TRUST
02. Surya Charitable & Welfare Society
03. Ekta Shakti Foundation
04. Maitri Research and Development Foundation
05. Bhartiya Manav Kalyan Pasrishad
06. Stri Shakti
07. Rao Raghuvir Singh Sewa Samiti
08. Royal Caterers
09. Jay Gee Hospitality Services
10. ISKCON
11. Himalayan Institute of Pollution Control

16. It is alleged that setting up kitchens required large investment for purchase of utensils, cooking gas piping system, hot water for washing and cooking, proper sanitation, disposal of waste, boilers, fumigation and water testing. The NFI inspected these kitchens and gave its observations. Out of the 11 Service Providers selected, two are women empowerment groups, namely, Stree Shakti and Indicare. These institutions/ NGOs enable destitute women to get employment in the kitchens. It is further averred that MCD entered into agreements with the 11 NGOs/Service Providers for a period of five years, which was to be renewed on year-to-year basis.

17. The MCD adverted to the mechanism developed for ensuring quality of food, such as checking of food at school level, through a committee comprising of Head Master of the school concerned, teacher in-charge of the Mid-day-Meal scheme, a member of the PTA and a member of Resident Welfare Association or a Senior Citizen living in the vicinity, who would check the food daily before serving it to the children. The second safeguard is inspection of kitchens at periodic intervals by the authorities of the Education Department posted at zonal and Head Quarter level which include the School Inspector (MDM), School Inspector (General), DEO/AEO of the zone on their own or jointly with the zonal authorities of Health Department. Inspections are also carried out periodically by Addl. Directors and Director (PE). Chairman, Education Committee and other members of the Education Committee. The third safeguard is independent evaluation through the Nutrition Foundation of India, an agency of repute in the field of nutrition headed by Dr. C.Gopalan, an internationally renowned and eminent nutrition scientist, with the objective of monitoring the overall process of cooking, supply, ensuring good quality of food and adequacy of quantity of food served. Other objectives of the evaluation were ensuring adherence to hygiene standards; food distribution system, etc. The agency does it through inspection of place of cooking as well as transportation of cooked food, and its distribution in the schools. It considers children's response/consumption pattern. It is averred that MCD has entered into an agreement with Sri Ram Institute for Industrial Research for lifting of samples of cooked food from the kitchens of the NGOs/Service Providers and from the schools where the supplies are made so as to ensure quality of the food distributed amongst children, for the purpose of their testing. According to its averment, the new system became fully operational in the beginning of the new session in July, 2005.

18. MCD avers that the transition of the Mid Day Meal Programme from processed food to cooked food was achieved over a period of two and half years starting from January, 2003. The process of consolidation could be completed, and higher standards could be ensured only by June, 2005. It thus took 2 ½ years for the programme to stabilize. The reason that it took so long is that it had no prior experience in providing cooked meals at such a scale. The process of improvement was achieved after periodical review through inspections by the officials of the Department as well as nutrition specialists of NFI and those which were considered incapable of improving were eliminated over a period of time. At the same time, the responsibility for infrastructure investment including land, building and machinery was put squarely on the shoulders of the service providers. All the standards required to be followed were prescribed. This resulted in a comprehensive scheme, which has received appreciation by other States in the country, who are making efforts to follow it.

19. It is averred that MCD executed agreements with the 11 approved NGOs/Service Providers for a period of five years renewable on an year to year basis. This was placed before the Corporation, routed through Education Committee and Standing Committee. The Education Committee, a statutory committee under DMC Act, 1957 approved the proposal with the modification that contract period of five years be reduced to one year and its renewal be effected every year. This was approved by the Standing Committee of the MCD in its meeting held on 26.10.2005, with the modification that the period of contract should be for three years initially, renewable on an year to year basis thereafter. It is averred that the MCD accordingly approved the proposal of provision of cooked food in MCD Schools through the Semi Automated Kitchens established by the selected NGOs/Service Providers. The agreements between the 11 selected NGOs and MCD came into force on 01.04.2005 and are valid upto 31.03.2008

20. The MCD avers that the Petitioners are only attempting to thwart a noble cause, after being unsuccessful, in the process of selection as adopted by it, for the allocation of work under the Mid-day-meal scheme. It is also alleged that the Petitioners at no point of time alleged bias in the inspection undertaken by the Commissioner of the Respondent Corporation and issuance of the Order dated 15.03.2005. Further the Order dated 15.03.2005 is based on Technical and Managerial evaluation of the 32 applicants of which 11 were successful. It is alleged that even the Petitioners' cases were put before the same selection Committee which had adopted a uniform approach guided by prudent and relevant selection parameters. The allegation of discrimination and arbitrariness, is therefore refuted. All persons, particularly the existing 32 service providers, were given an equal opportunity, and their premises were inspected. As a result of deliberations, and consideration of relevant materials, the 11 agencies were found more suited. Therefore, the decision, dated 15-3-2005 awarding the contracts to them is sound, and legal.

21. It is averred by the contesting private respondents, i.e. the agencies awarded the contracts, that the complaint of arbitrariness and discrimination is not well founded. They, like the petitioners were providing cooked mid-day meals to the schools, prior to 1-2-2005 or 15-3-2005; they were not fresh beneficiaries. The parameters adopted by MCD were based on relevant considerations and for justifiable reasons. The petitioners, after knowing about their discontinuation as service providers on account of quality issues, cannot complain of discrimination.

22. Mr. V.P. Chaudhary, Senior Counsel and Mr. Naveen Singh, appeared on behalf of the petitioners. It was contended that the MCD could not enter into contract with the other agencies, impleaded as private contesting respondents

and for such long periods as five years without considering all those eligible, through a fair, reasonable, and non-arbitrary process. The three occasions when it did choose to put up advertisements, the notices dealt only with some conditions, but nowhere stipulated the details, which ultimately resulted in the impugned orders, and impugned contracts, with the concerned respondents. It was submitted that the petitioners, having been awarded the contracts and allowed to work them out through extensions periodically, were entitled to non-arbitrary treatment. They were never informed about any deficiencies, or separate standards, so as to enable them to compete with others who were presumably having better facilities.

23. It was submitted that in judicial review under Article 226 of the Constitution, this court can scrutinise the award of the contracts by the government or its agencies in exercise of its powers to prevent arbitrariness or favouritism. It was contended that the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though a decision is not amenable to judicial review, on merits, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness, illegality and arbitrariness. Learned counsel relied on the decisions reported as *Sterling Computers Ltd. v. M & N Publications Ltd.* (1993) 1 SCC 445; and *Tata Cellular -vs- Union of India* 1994 (6) SCC 651.

24. Learned counsel relied on the contracts entered into by the MCD with each of the petitioners, and submitted that if there was any doubt as to the nature of their performance, or the quality of food supplied, there would have been no periodic extensions. These facts demonstrated that the MCD did not, and could not have any objection about the performance, or quality of the food supplied. In many cases, the petitioners' initially awarded quantities were increased. If the MCD wanted the petitioners to work differently, it should have put the matter fairly to them, instead of arbitrarily not renewing the contracts and straightaway entering into long term arrangements with others, some of whom had not even been given contracts in the first round. Fairness and reasonableness is an essential facet of Article 14. The MCD acted unfairly with the petitioners and in order to favour the contesting private respondents, by granting the contracts to supply mid day meals to them.

25. Learned counsel submitted that the decision of MCD to grant contracts to others was vitiated by non-application of mind, because the Nutritional Foundation of India, in the course of its report, after inspection of all the existing service providers had commented adversely against some of the existing providers, including the respondent Stri Shakti. Similarly, the report was favourable in respect of a few petitioners. Yet, Stri Shakti was awarded the contract; the petitioners' claims were completely ignored. It was submitted that the award of contract in February- March, 2005 was through a completely non-transparent process, where no criteria were spelt out, and persons or NGOs were virtually picked from a hat, or awarded contract, through invitation, as it were. This behaviour was arbitrary, and a negation of Article 14 of the Constitution of India, which mandated equality of opportunity to all similarly circumstanced. The denial of reasons for renewal of the petitioners' contracts, not furnishing reasons for awarding the contract to others and not even issuing any show cause notice to the Petitioners as to why their contracts were not proposed to be renewed, established discrimination on the one hand, and arbitrariness on the other.

26. Learned counsel relied on the decision of the Supreme Court in *Food Corporation of India -vs- Kamdhenu Cattle Feed Industries* 1993 (1) SCC 71, and

submitted that the petitioners had a legitimate expectation that the arrangements in their favour would be continued and they would be treated at par with the contesting respondents, but failure of MCD to consider and give due weight to it rendered the impugned decision arbitrary. It was urged that the requirement of consideration of legitimate expectations is an intrinsic part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Reliance was also placed on the decision of the Supreme Court reported as Haji T. M. Hassan Rawther, vs Kerala Financial Corporation, AIR 1988 SC 157; counsel submitted that the MCD could not have acted arbitrarily and entered into relationship with any person it liked at its sweet will, but its action should have been in accord with some principle which met the test of reason and relevance. They also relied upon the decisions reported as Kasturilal Lakshmi Reddy -vs- State of J& K AIR 1980 SC 1992, and Kumari Shrilekha Vidyarthi -vs- State of UP 1991 (1) SCC 212. In the decision, it was held that:

"...27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14."

27. It was submitted that the decision to continue, and award contract for longer periods to agencies such as Stri Shakti, whose proven track record, were poor, and which had faced public controversies, demonstrated that the MCD was motivated by irrelevant considerations.

28. Learned senior counsel for the MCD, Shri Raj Birbal had argued the matter initially. Later, on account of his illness, the matter was adjourned at the request of MCD. The arguments were concluded by Shri Sanjeev Sabharwal.

29. It was urged that the Mid-day-Meal Scheme (MDM) was implemented for all the students studying in MCD Schools. Earlier the scheme was confined to schools situated in J.J. Colonies, Resettlement Colonies, Slum Areas and areas predominantly inhabited by weaker sections of society. It is a socio-welfare measure, by which the students' nutritional levels are to be improved, and meant to ensure attendance in schools. The scheme is part of the Integrated Child Development Programme.

30. Learned counsel submitted that the scheme formulated by the MCD was not in the nature of a commercial contract, where competitive bidding or considerations of awarding contracts to those quoting best rates was involved. The scheme was entirely different; its contents were fixed, in the sense that the rate (Rs.2/- per meal, per child); the menu, the standards, etc were all pre-determined. The

intention of the public agency, viz MCD was not to enter into a commercial relationship, but to further its socio-educational obligations. The MCD therefore, had to satisfy itself that those expressing willingness were genuine and their processes were up to the desired quality and standards.

31. Learned counsel submitted that the petitioners were virtually seeking a command to enter into contract with them, which was not permissible in civil law, let alone feasible in the realm of writ jurisdiction. It was submitted that further, being a first time measure the MCD had to fine tune its policies. As a result, when the advertisements were issued and contracts were awarded in 2003, the immediate need to carry on with the work was taken care. Later, problems faced in supplying quality cooked mid day meals were lack of infrastructure on part of the service providers. Kitchens of the service providers existed and operated in insanitary and unhygienic conditions; additionally, MCD found it difficult to monitor the work of 50 or more service providers, functioning in a decentralized manner. To streamline functioning it was decided to consolidate the operations rendering it easy to monitor performance, and to set better standards of health and hygiene. The Expression of Interest were invited on 09.04.2004, appealing to institutions to offer 1 to 2 acres of land each, for the establishment of Automatic/Semi-Automatic Kitchens on donation or rent basis. In response to this advertisement, 14 applications were received. Negotiations were held with these institutions.

32. It was submitted that on the basis of report of inspection of the existing institutions who numbered 32, a further exercise was conducted in February, 2005. Thereafter the 11 agencies selected were given the work orders, on the basis of better standards and quality norms. These norms were contained in a notification dated 23-2-2005 based upon the recommendations of the Nutrition Foundation. The notification reads as follows:

"MUNICIPAL CORPORATION OF DELHI
EDUCATION DEPARTMENT : HQ

No.D/DEO (MDM)/2005/480

Dated 23/02/2005

During the inspection of kitchens, it has been assessed that the following minimum requirements are to be met by all the kitchens for the new system :

1. Water purification system to be installed.
2. Water quality to be tested every month by the food processors and submitted to the department which will maintain a computerised record of the same for each one.
3. In storage area regular fumigation and pest control to be done every three months to protect against rodents and the record to be maintained in a computer by the department.
4. Waste management to be properly done and checked by NFI.
5. Closed and secured container to be used for transporting food and each container should be such that it can serve one section at a a time.
6. Use of LPG to be properly secured through a piping system.

7. Boiler plat/solar water heating system for using hot water for cleaning and cooking.
8. Use of steam cooking except for NGOs employing, women like Stri Shakti and Indcare so that they can employ larger number of women.
9. Use of gloves and headgear and apron to be compulsory.
10. Use of vegetable cutting machines, poori making machines, dough kneading machines, chappati making machines and other such equipment to be compulsory.
11. Fire protection measures to be taken to protect against any untoward incident.
12. Proper water arrangements for cooking, cleaning and heating.
13. Proper water disposal arrangement for waste water.
14. Proper waste disposal arrangement for disposal of waste.
15. Oil trap for cleaning wasted oil so that it does not enter the drainage system.
16. Proper transport arrangement for transporting the food in secure condition to schools.
17. Painting on each van "Feeding the children of Delhi Mid Day Meal Plan of Municipal Corporation of Delhi and (name of the food processor).
18. All suppliers will keep a record of the response of the children to the food served so that it can serve as a basis for further improvements.

All concerned are requested to take necessary steps and file an Action Taken Report within days positively but not later than 4th March 2005.

This issues under the order of Competent Authority.

(B.C. Narula)
Dy. Edn. Officer
(Mid- Day-meals)

All concerned "

33. Learned counsel submitted that the rule of awarding the contract on the basis of tenders, or published criteria, is not invariable; it may yield to the exigencies of the situation, having regard to the nature of the activity. The state or its agency can make pragmatic adjustments and take policy decisions which may be necessary or called for under the peculiar circumstances. The court cannot strike down a policy decision taken by the Government just because it feels that another decision would have been fairer or wiser or more scientific or logical. In State of M.P. v. Nandlal Jaiswal (1986) 4 SCC 566) it was held that the policy decision can be interfered with by the court only if such decision is shown to be patently arbitrary, discriminatory or mala fide. A method of securing the public interest, for disposal of public property is to sell it by public auction, or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the

general rule, it must be shown that such an action was rational and not suggestive of discrimination. Counsel relied on the judgements reported as G. D. Zalani v. Union of India 1995 Supp (2) SCC 512 and Netai Bag -vs- State of West Bengal 2000 (8) SCC 262.

34. It was contended that the MCD was concerned with the quality and standards, since the contracts pertained to nutritional needs of young children and were part of the welfare of the people. The concern, unlike in commercial contracts, was not with rates, or the soundness of the venture, but the ability of the agency to cook the food, deliver it promptly and in accordance with the demands of hygiene. Having regard to the previous experience gained from the work of the 32 agencies, an extensive survey through Nutritional Foundation was conducted; this was followed up with inspections in February 2005. Having regard to the capacities, location, the physical infrastructures and the ability of the agencies, the contracts were finalized for five years; later after approval the initial period was reduced to three years. It was also submitted that the MCD gave preference to self help groups and women NGOs; Stri Shakti, one of the contesting respondent agency, fulfilled that criteria.

35. Counsel for the contesting respondents, who had been awarded the contracts, adopted the submissions advanced on behalf of the MCD; in addition, it was submitted that the petitioners cannot seek a mandatory order from this court, to award them the contract. It was submitted that the questions sought to be raised, could not be agitated by the petitioners, by reason of estoppel. It was submitted that the petitioners were beneficiaries, having secured contracts for periods ranging up to one year. They cannot complain that the process of award of contract was vitiated for non disclosure of relevant criteria, because the process by which they were awarded contract was also, for the same reason, equally non-transparent. Having enjoyed the orders, they were estopped from complaining of arbitrariness.

36. The factual matrix relating to this controversy hinges around the nature of power and duty of the State to give opportunity to those concerned, while entering into public contracts which are not of a commercial nature, but are meant to further socio-economic objectives. The facts are not manifold; pursuant to directions of the Supreme Court, the State agencies decided to formulate schemes known as "Mid-Day Meals Scheme" whereby students at the primary school level were to be given basic nutritional support. This was aimed at fulfilling more than one objective; viz, ensuring continued attendance of pupils in schools where the drop out levels were the highest; proper utilisation of food-grains which could have otherwise been wasted and giving proper nutrition to a vulnerable section of the society. The MCD formulated this scheme under which the nutritive component was defined (300 k cal, 8-12 gms per protein); and the menu was fixed. On the basis of these parameters, those willing to supply such cooked meals were to be given a fixed rate of Rs. 2 per meal, per student. Offers were invited in 2003, i.e. in January and August through public advertisements. In addition to this, agreements were executed by the MCD with various authorities and NGOs including the petitioners. Initially, the arrangements were to be for a few months. They were continued and in many cases contracts were given two or three extensions. According to the arrangements, the MCD could inspect the premises and also have the food checked any time. In case the food was not up to the requisite standards, it could be rejected. The supply at every school, was first subject to sample tasting by a committee; the pupils were given the food thereafter.

37. In April, 2004, the MCD, on the basis of its experience gathered for over a year, advertised again eliciting responses from willing parties. This time

the advertisement mentioned that 1875 primary schools had been beneficiaries of the Scheme pursuant to the order of the Supreme Court. It also mentioned that those willing to make available one or two acres of land for establishing kitchens, should approach it. The land was to be used only for the purpose of setting up kitchens to cook meals under the Scheme. Apparently, 14 organisations/persons approached the MCD. They however, had apprehensions about allowing the land to be used by other agencies, even if it was under the aegis of a public body or corporation. In stead, these bodies owning the lands were willing to set up the kitchens according to the prescribed standards.

38. Sometime in October, 2004, the inspecting agency nominated by the MCD, namely, the Nutrition Foundation of India inspected the kitchens of the NGOs and agencies which were engaged in supplying cooked food according to the then existing arrangements. It made detailed analysis and graded them for the facilities and various spheres of operation. This inspection included the petitioners as well as some of the respondents who had been supplying cooked food. The existing arrangements in respect of some NGOs ended on 31.12.2004. The arrangements of some of them were extended. In the meanwhile, the MCD proposed to enter into long-term arrangements with some of the units; however, those agreements scheduled to be operative from 01.02.05 were not given effect to. The Commissioner of MCD, aided by certain officials visited the sites of the existing operators/contractors on 11.02.05. On the basis of recommendations of the Nutrition Foundation of India as well as inspection, certain criteria, concerning cleanliness, hygiene and the capabilities of the kitchens were spelt out. These were issued on 23.02.05. A team of MCD officials visited the site of all the 32 NGOs who were operating, on three dates in March, 2005. An inspection report detailing its recommendations was furnished to the MCD. Eventually, this led to the award of work to eleven agencies. These eleven successful agencies/ NGOs included many who had been doing the same work earlier. One of them had even petitioned this Court, namely, the Himalayan Institute of Pollution Control & Social and Economic Development. Its petition was later withdrawn. The work awarded initially was for five years, was later modified by the MCD; the initial contract was to be for three years, that would end in the year 2008 and could be renewed annually, at a time, on two occasions.

39. There is a considerable body of case law that the State, in any facet of its personality, acting in the performance of its "normal duties" as a State or through its agencies, set up for specific objectives, has to act reasonably, in a non-discriminatory and non-arbitrary manner. Thus, when a State or State agency deals with public property or has to enter into contractual relationships, its decisions cannot be based on whims, caprice, personal likes or prejudices, but have to be informed with reason. All those similarly circumstanced and possessed of the ability to engage the State in such relationships should be exposed to similar opportunities to negotiate and attempt successfully to enter into such relationships. It has, therefore, been held that disposal of property and award of contract should be ordinarily proceeded by some kind of publicity, calling for "tenders" or "applications" from those interested in it. (R.D. Shetty -v- International Airports Authority of India AIR 1979 SC 1628, Kasturi Lal -v- Lakshmi Reddy AIR 1980 SC 1992, Kumari Shrilekha Vidyarthi AIR 1991 SC 537, Mahabir Auto Store -v- Indian Oil Corporation AIR 1990 SC 1031).

40. The main argument on behalf of the MCD, was that the nature of contract or agreement shows that it was pure and simple, a welfare measure, beyond the pale of judicial review, since applicability of standards evolved in relation to commercial contracts were inapposite. It was urged that the content of the relationship entered into by the contracting parties with the MCD was radically

different. It was not premised on profit but founded on social and educational welfare. The contracts were, therefore, fashioned in a different manner; the service provider did not have the space to negotiate different rates - he was bound by contents of fixed rates, standard and pre-determined menu with a fixed calorific quantity of the meal. In addition, under the Scheme, the MCD dictated the manner of execution of the contract. Therefore, the question of obtaining the best price (as in the case of disposal of public property) or paying the least price by the Corporation (as in the case of awarding a contract pursuant to tender negotiation) could not have arisen. It was submitted that in these circumstances, the MCD had greater leeway and could look only to those it deemed by it to be most suited to fulfill the objectives. If it went by conventional mode of advertisement, consider the applications of all concerned and were then to negotiate with them, there could possibly have been entirely different results which may not have been in the public interest. The nature of judicial review in this case, therefore, has to be different and the Court ought not to interfere with exercise of executive power, which necessitated considerable "free play in the joints"

41. The decisions of the Supreme Court right from R.D. Shetty's case (supra) to Tata Cellular -v- Union of India 1994 (6) SCC 651, particularly, Kumari Shrileekha Vidyarthi, Mababir Auto Stores, etc. have reiterated the pervasiveness of Article 14 in relation of every activity of the State in its myriad forms acting through its manifold agencies and for varied purposes. Indeed in Life Insurance Corporation of India -v- Consumer Education and Research Centre, 1995 (4) SCC 482, the Supreme Court, after reviewing in detail several previous decisions held that actions of the State, its instrumentalities and public authorities or of persons whose actions bear the insignia of public law element or public character are amenable to judicial review and that the legality of such actions would be tested upon the anvil of Article 14. The Court defined the content of public law remedy as intervention in exercise of judicial review power where the actions of State or its agencies bearing the imprint of public interest element, can be examined. It is thus far too well established that non-arbitrariness and fairness are considered as two unalterable corner stones of the principle of equality, an immutable legal behavioural baseline. Every action, policy or even change of policy in the realm of State activity therefore, has to be informed, fair and non-arbitrary. In Union of India -v- International Trading Company, (2003) 4 SCC 579 the Supreme Court held:

"While the discussion to change the policy in exercise of the executive power when not trampled by any statute or rule, is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give the impression that it was done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the fields of activity of the State is a expected tenet. The basic requirement of Article 14 is fairness in action of the State and non-arbitrariness in essence and substance is the heartbeat of fair play."

42. In view of the above discussion, the contention of MCD that being a welfare measure, the award of work order/contract to the contesting respondents, not being akin to commercial dealings by the State, should not be scrutinised by applying parameters evolved by the Courts over the last three decades, has to fail. The submission is over ambitiously wide. No measure, including public welfare measures are immune from scrutiny. The standards applicable for judicial review may be a matter of debate but the reach of the Court and the intensity of its scrutiny cannot be excluded.

43. The next question is whether in the facts of this case, the method adopted by the MCD as it did in finally entering into contracts and issuing the impugned order dated 15.03.05 awarding the contracts to eleven NGOs is not in consonance with fair play and whether it is arbitrary.

44. As discussed in the preceding paragraphs, the MCD had issued two advertisements in 2003. These, however did not spell out in detail the methodology to be adopted while entering into contracts, the nature of supplies expected from the agencies and the terms and conditions. It is, therefore, no one's case that these matters were unknown. Indeed, all the petitioners were beneficiaries - they had approached the MCD at one stage or the other and were granted work orders which in some cases extended for more than a year. In some of the cases, the quantities were also increased. At one stage, about 32 agencies/ NGOs were carrying on the activity of supplying cooked food. Therefore, the grievance cannot be that at the initial stage, the MCD did not intimate the concerned parties about its plan or elicit offers from those interested in it. What is sought to be projected is that the MCD ought to have extended the arrangements in favour of the petitioners and that they were legitimately expected to be informed of deficiencies or defects before others could be awarded long-term contracts. Another limb of this argument is that, had the petitioners been aware of what was required of them, they too could possibly have up-graded their facilities and been given a chance to do the same work.

45. The normal rule is that wherever a government agency seeks to dispose of property or enter into contracts, it must do so consistent with Article 14, after giving appropriate publicity in that regard. This however, is not an invariable rule; decisions have accepted that there can be departure from such a requirement. In *Kasturilal's case* (supra), which was relied upon by the petitioners in this case, the court held as follows:

"If the State were giving contract simpliciter there can be no doubt that the State would have to auction or invite tenders for securing the highest price, subject, of course, to any other relevant overriding considerations of public weal or interest, but in a case like this where the State is allocating resources such as water, power, raw materials etc. for the purpose of encouraging setting up of industries within the State, we do not think the State is bound to advertise and tell the people that it wants a particular industry to be set up within the State and invite those interested to come up with proposals for the purpose. The State may choose to do so, if it thinks fit and in a given situation, it may even turn out to be advantageous for the State to do so, but if any private party comes before the State and offers to set up an industry, the State would not be committing breach of any constitutional or legal obligation if it negotiates with such party and agrees to provide resources and other facilities for the purpose of setting up the industry."

This line of reasoning was adopted in *Sachidanand Pandey -vs- State of West Bengal* 1987 (2) SCC 295. It was held that in *Natai Bag v. State of West Bengal*, 2000 (8) SCC 262 that the Government can make pragmatic adjustments and frame policies which may be necessitated due to particular circumstances, and that when such a departure is made, it should be justified on rational and non-discriminatory considerations. Similar reasoning had found favour in *M.P. Oil Extraction v. State of M.P.* (1997) 7 SCC 592. This approach was also approved in *Chairman & MD, BPL Ltd -vs- S.P. Gururaja* 2003 (8) SCC 567.

46. In *Tata Cellular v. Union of India*, (1994) 6 SCC 651, at page 687, the Supreme Court re-stated the law in the realm of public contracts and policies that impact upon commercial or economic matters, after reviewing its previous position on the scope of judicial review. The relevant portion of the judgment,

outlining the powers and duties of the State or its agencies, is reproduced below :

"(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides."

As to what precisely is "Wednesbury" unreasonableness or irrationality, was discussed in four paragraphs of Tata Cellular (supra). It would be useful to extract a quotation, (occurring in para 79 page 679, SCC reports of Tata Cellular), -describing the scope of such irrationality or unreasonableness- from R. v. Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd.1988

(1) All ER 961:

"The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere..."

47. The Court in India have consistently followed the decision in Tata Cellular, in cases involving award of tenders, policy formulation by the State or public agencies, etc. In subsequent decisions, it has been held that courts can interfere when the policy or the award of contract is arbitrary, or discriminatory, is mala fide or it has no nexus with the object it seeks to achieve, (Ref Air India Ltd. v. Cochin International Airport Ltd.(2000) 2 SCC 617; Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corpn., (2000) 5 SCC 287; Directorate of Education v. Educomp Datamatics Ltd., (2004) 4 SCC 19; Global Energy Ltd. -vs- Adani Exports Ltd 2005 (4) SCC 435; and M/s Master Marine Services (P) Ltd -vs- Metcalfe & Hodgkinson 2005 (6) SCC 138).

48. In the overall conspectus of this case it is undeniable that the real intention and purpose of the MCD, i.e. to put in place an efficient mechanism for the mid day meal scheme, where service providers could supply hygienically cooked food and ensure its timely delivery, was known to all. Equally, its interest in ensuring proper and effective monitoring, to achieve quality and standards, in nutrition and hygiene, was well known. The MCD, with the aid of several NGOs, including the petitioners, experimented, and strove to achieve its purpose. This included inspections; one such was an extensive inspection by the third party agency; this was followed by two on the spot visits by the Commissioner, MCD and other high ranking officials. Having regard to the nature of the activity, i.e. one of pure welfare and the previous history, the invitation of the petitioners to draw an inference that the last action, in handing over services or awarding the contracts to eleven three service providers, was arbitrary as it was not preceded by any public announcement or advertisement of the terms, or the standards, is without merit. The MCD acted as it did, in furtherance of its policy, pursuant to Supreme Court's directions. That policy is neither unreasonable nor arbitrary. While it is normally expected of public agencies to give appropriate publicity in regard to award of contract, distribution of largesse and disposal of property, every departure from that norm, cannot be characterized as unwarranted. As discussed above, there may be

situations where a departure may be necessary; in any case, if it is suitably justified before the court, judicial review will be denied. In fact, recourse to judicial review in such cases may be an unwarranted intrusion, capable of destroying the objective of the public agency.

49. Two subsidiary questions arise, i.e. whether the petitioners were treated in a discriminatory manner and whether the MCD's failure to extend the period of their contract violated Article 14, as denying due consideration to their legitimate expectations.

50. As held earlier, every executive decision or policy can be tested in judicial review, on grounds of "Wednesbury" unreasonableness, discrimination, arbitrariness, mala fide, illegality and irrelevant considerations. Mala fides, or malice, as the expression is more commonly known, was defined in Smt. S.R. Venkataraman v. Union of India, 1979 2 SCC 491, as follows:

"It is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is however, quite different. Viscount Haldane described it as follows in Shearer v. Shields:

'A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently.'

Thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause."

Likewise, in State of A.P. and Others v. Goverdhanlal Pitti, (2003) 4 SCC 739, the Supreme Court observed:

"12. The legal meaning of malice is "ill-will or spite towards a party and any indirect or improper motive in taking an action". This is sometimes described as "malice in fact". "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others". (See Words and Phrases Legally Defined, 3rd Edn., London Butterworths, 1989.)

13. Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object. Prof. Wade in his authoritative work on Administrative Law (8th Edn., at p. 414) based on English decisions and in the context of alleged illegal acquisition proceedings, explains that an action by the State can be described mala fide if it seeks to "acquire land" "for a purpose not authorised by the Act..."

51. Nothing was brought on record to substantiate the grievance that the decision to award the contracts was for any oblique purposes or after eschewing relevant considerations. In fact, the report of the Nutritional Foundation of India, in October 2004 was made available to the court. The report is not very flattering so far as the petitioners are concerned. No doubt not all contesting respondents do not emerge exactly with flying colours; yet, the observations as far as they are concerned, does not reflect as poorly about their work. Stree Shakti, for instance, received an overwhelming "Fair" report in respect of 48 out of 64 kitchens managed by it. Two further inspections were undertaken,

before the final decision was arrived at; the petitioners' ratings were consistently poor. The observations relating to the petitioners are extracted below:

"...5. SWERA (Central Zone): The ventilation was not adequate. There were no exhaust fans. the floor of, the kitchen was not clean. Food handlers were not wearing aprons, head gears and gloves. A piece of land measuring about 800 sq. yards was shown. The proposed land is owned by somebody else and is being used for parking of vehicles.

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8. Dalit Manav Uthan Sansthan (Sh. North Zone) : The surroundings were dirty with open drains. The space was inadequate for both preparation as well as cooking areas. Washing and food assembly was done in an open courtyard with mud floor. There was no platform for chopping/cutting operations in the preparation areas. the lighting and ventilation were grossly inadequate. The kitchen was not well maintained. Floor was dirty and wet. The food handlers were not wearing aprons, headgears and gloves. A piece of land was shown which is situated at the extreme end of Sonia Vihar. The area is neither electrified nor has the facility of Delhi Jal Board water.

9. Vijay Caterers (Narela Zone) : The accommodation indicated by the petitioner in the representation is being used for residential purposes. Sh. Vijay showed the inspection team a piece of land. The land has a boundary wall but no built up portion. The land title is in the name of some other persons. The services of this caterer were discontinued on account of poor performance by NFI in its report.

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11. Subhas Rana (Narela Zone) : It was noted during the inspection that cut vegetable had been kept uncovered in the cooking area. there was not pest control mechanism. The food handlers were not wearing aprons, headgears and gloves.

12. Chiranjiv Prabhakar (Narela Zone) : There wa not pest control mechanism. The food handlers were not wearing aprons, headgears and gloves.

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18. Tejshree Khadi Gramodyog Sansthan (Sh. North Zone). The kitchen of this NGO at Dyalpur was visited. There was no platform for cutting/chopping of vetetables. the lighting and ventilation was not adequate...."

52. In view of the above discussion, there can be no inference of malice or mala fides, i.e. wilful disregard of the rights of the petitioners, whose contracts were admittedly ending in December 2004, or in February, 2005. Likewise, there is no material to conclude that the decisions were vitiated by any favouratism, or by discriminating against the petitioners. The MCD's stand is that it based the decision to award the contract to 11 agencies, after considering relevant factors such as hygiene of the kitchens, the availability of semi automatic kitchens in healthy environment, the need to consolidate operations for effective monitoring, etc. These goals were set during deliberations and after inspections. I see no infirmity with this approach or a conscious attempt to single out, or discriminate the petitioners.

53. As regards legitimate expectations of the petitioners, the doctrine is only a facet of Article 14 of the Constitution in requiring non-arbitrary treatment; by itself, the doctrine, or principle does not give rise to an enforceable right. It is only while testing the action taken by a government authority, in judicial review, as to whether it is arbitrary, that the doctrine is relevant. The limitations of this doctrine were mentioned in *State of W.B. v. Niranjan Singha*, (2001) 2 SCC 326, after the court considered the previous decision in *Food Corporation of India's case* (supra). It was remarked in *Union of India -vs- Hindustan Development Corporation* 1993[3] SCC 499 that the doctrine [legitimate expectation] is " not the key which unlocks the treasury of natural justice and it ought not to unlock the gates that shuts the court out of review on the merits." In *P.T.R. Exports (Madras) (P) Ltd. v. Union of India*, 1996 (5) SCC 268 it was held that :

"The doctrine of legitimate expectation plays no role when the appropriate authority is empowered to take a decision by an executive policy or under law. The court leaves the authority to decide its full range of choice within the executive or legislative power. In matters of economic policy, it is a settled law that the court gives a large leeway to the executive and the legislature. Granting licences for import or export is by executive or legislative policy. Government would take diverse factors for formulating the policy for import or export of the goods granting relatively greater priorities to various items in the overall larger interest of the economy of the country"

It is further well settled that specific performance of contract would not be enforced by issuing a writ of or in the nature of mandamus, particularly when, in view of the provisions of the Specific Relief Act, 1963 damages may be an adequate remedy for breach of contract. (*Ref Noble Resources Ltd. -vs- State of Orissa* 2006 (9) SCALE 181; *Indian Oil Corporation -vs- Amritsar Gas Service* 1991 (1) SCC 533).

54. In conclusion it may be said that the judicial review, though broad, has to be understood and invoked contextually; the tools shaped by courts and tempered over decades of experience, are to be used with care. Expressions such as "unreasonable", "arbitrary" "malice" have definite content. The court called upon to adjudicate a dispute in exercise of its judicial review power should evaluate all factors; often these expressions, used injudiciously, or inappropriately, could well lead to entirely contrary results. Thus, in *Tiller v. Atlantic Coast Line Rail Road Co.* (318 US 54 : 87 L ED 610 (1942)) Justice Felix Frankfurter said that:

'A phrase begins life as a literary expression; its felicity leads to formula, indiscriminately used to express different and sometimes contradictory ideas.' In the view of the above reasoning and conclusions, I am satisfied that the decision of the MCD, impugned in these proceedings, to award the contracts to the contesting respondents cannot be termed as illegal, mala fide, or arbitrary, calling for intervention under Article 226.

55. The above conclusions normally ought to have been dispositive of the petitions. Yet, there is one aspect which impels me to make further comment. It is a matter of record that the MCD shortened the duration of the contract awarded to the contesting respondents to 3 years, and made it subject to renewal annually, subject to two such renewals. It may be appropriate for the MCD to consider at the stage of each renewal, to apply all the rigorous standards; it may also consider whether to call others, (similarly circumstanced, who might be available and have developed capacity, or upgraded their facilities, during the interregnum) to submit their bids, in an appropriate and suitable manner, in the light of the experience gained. After all, the activities in question are in the

nature of public welfare, and public interest demands that those best suited or equipped should be granted the work, after a proper consideration.

56. In the light of the above findings and conclusions, the petitions have to fail; they are accordingly dismissed, however, subject to the directions in the preceding paragraph. The parties are left to bear their own costs.

Sd/-
(S. RAVINDRA BHAT)
JUDGE