

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Reserved on: 09.12.2010
Date of decision: 23.12.2010

+ WP (C) No.7642 of 2010

MEROFORM (INDIA) PVT. LTD. ...PETITIONER
Through: Mr. Rakesh Tiku, Advocate.

Versus

THE UNION OF INDIA & ANR. ...RESPONDENTS
Through: Mr. B.V. Niren, Advocate for R-1.
Mr. G.L. Rawal, Sr. Advocate with
Mr. Kuljeet Rawal, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE M.L. MEHTA

- | | | |
|----|--|-----|
| 1. | Whether the Reporters of local papers
may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be
reported in the Digest? | Yes |

SANJAY KISHAN KAUL, J.

1. The Apparel Export Promotion Council (for short 'AEPC'), respondent No.2 invited tenders in July, 2010 for engaging an event management agency for the International Trade Fair, Tex-Styles India-2011, to be held in February, 2011at Pragati Maidan, New Delhi. The petitioner applied in pursuance to the tenders floated in this regard. The bid process envisaged two stages of evaluation, i.e. technical bid and the financial bid.

2. The scope of activities for which the bid was invited included designing of logo, registration counter, stall construction, parking, signage/hoarding, audio-visual equipments, communication of the event, cafeteria, security, housekeeping, local transport for buyers, photograph, printing and mailing activities. The bids were evaluated based on the parameters fixed by the respondents. The petitioner was selected for award of the work, the total cost of the project being estimated at ₹17.44 crore. The petitioner claimed management fee of 12.5 per cent of the total expenditure, excluding hall rentals, catering expenses and stall construction. Respondent No.2 in terms of letter dated 9.9.2010 issued the Expression of Interest appointing the petitioner as the event management agency subject to finalization of agreement, terms & conditions and financial bids.
3. It is the case of the petitioner that thereafter meetings were held regarding work, but since the time for execution was short and the formalities were to take some time, it was requested to start the work. The petitioner prepared a team of professionals to get on with the job. The petitioner claimed to have got a number of consultants and professionals of its own and the petitioner company has a turnover of more than ₹70.00 crore and it has been doing similar works for various authorities including the Government authorities. Thus, it had no hesitation in starting the work and even copies of logo were prepared.
4. A copy of the agreement to be entered into was sent by respondent No.2 enclosed with its e-mail dated 10.10.2010. There were certain aspects on which the petitioner sought queries vide its e-mail dated 15.10.2010.

5. The petitioner received a letter from respondent No.2 dated 20.10.2010

in the following terms:

“Dear Sir,

1. Kindly refer to our Expression of Interest letter September 9, 2010.

2. We had sent you the Draft Agreement, which is yet not signed by you.

3. Attention is invited to certain news telecast on Television on 19th Oct., 2010 and also news item on 20th Oct., 2010 about the raids conducted by the Enforcement Directorate and others, mentioning the name of “Meroform (India) Pvt. Ltd.”.

Immediately, after hearing this, AEPC had tried to contact senior officials of M/s. Meroform (India) Pvt. Ltd., to ascertain the status, however, we could not get the status. This may adversely affect smooth implementation of our project of Tex-Trends India 2011.

You are requested to kindly inform us about the status of the above within 3 days.

Kindly also acknowledge receipt.

With best regards.”

6. The aforesaid letter was responded to on 22.10.2010 by the petitioner

in the following terms:

“Dear Sir,

This refers to your letter no.AEPC:HO:EP:MII:2010 dated October 20, 2010.

As regards the News item, the enquiry is being conducted on many companies who are involved in making Commonwealth Games Project. CWG contract is in GL Litmus Events Pvt. Ltd. in which Meroform India P. Ltd. is a shareholder in the consortium. However, we assure you that this will not affect the execution of the project. We have a separate dedicated team who would execute the project to your best satisfaction.

In this connection we would also like to inform you that yesterday we have been awarded by India Tourism Development Corpn., A Govt. of India undertaking based at 3rd

Floor, Jeevan Vihar Building, New Delhi the work of Designing and Fabricating temporary hanger structure at Vigyan Bhawan for PETROTECH 2010, being organized by PETROTECH Society (A society under the Ministry of Petroleum & Natural Gas, Govt. of India). The file is under process and we will receive the formal letter of appointment from ITDC in a few days.

As regards Draft agreement, we have already sent an e-mail in this regard on October 15, 2010, copy as under, for which we have been awaiting your response. We look forward to receiving the final agreement after incorporation of relevant clauses so that we can sign and return the same.”

7. The aforesaid shows that there were two aspects raised by the AEPC, the first being the non-signing of the draft agreement to which the petitioner replied that it was awaiting the response of respondent No.2 in view of its e-mail dated 15.10.2010.
8. The more important aspect was arising from the apprehension expressed by respondent No.2 on account of telecast of certain news items about raids conducted by the Enforcement Directorate which was sought to be explained away by the petitioner. The petitioner stated that in view of the allegations relating to Commonwealth Games project there were certain searches carried out in respect of GL Litmus Events Pvt. Ltd. in which the petitioner company was a shareholder in the Consortium. It was sought to be explained that this would not affect the works to be carried out by the petitioner in the aforementioned project.
9. On 26.10.2010, the petitioner received an e-mail from respondent No.2 informing of a meeting by the Secretary General, AEPC in the morning of 27.10.2010 where one of the agenda items, numbering 7, related to the discussion of continuing appointment of the petitioner after raids on the firm. The Committee was to decide whether to continue with

the petitioner as event management agency or appoint another technically qualified agency despite the response of the petitioner that it was only a shareholder in the Consortium where searches had been carried out and had a separate dedicated team to execute the job awarded by respondent No.2. The next communication is dated 1.11.2010 to the petitioner by respondent No.2 referring to the meeting which was held with the Secretary General, AEPC when it was informed that both Mr. & Ms. Binu (of the petitioner company) were in hospital and would be unable to come to the meeting. We may note that a representative of the petitioner, however, attended the meeting. The matter had been put before the Pilot Committee of the Ministry of Textiles in the subsequent meeting held on 29.10.2010 which after detailed deliberations decided to withdraw the Expression of Interest dated 9.9.2010 issued by respondent No.2 and disengaged the services of the petitioner for the 'Tex Trend India-2011' with immediate effect.

10. The petitioner was aggrieved by this letter and sent a detailed response dated 3.11.2010. The petitioner emphasized that it had put in huge efforts including travel to outside Delhi on short notices and that the petitioner stood to lose huge business opportunities because they did not take up other jobs at the same period including one of respondent No.2 itself to be held in Chennai. A request was, thus, made to reconsider the matter. The aspect of the petitioner executing many other projects for Government and non-Government agencies was also emphasized. There was, however, no response.
11. It is in the aforesaid circumstances that the petitioner filed the present writ petition under Article 226 of the Constitution of India on

12.11.2010 seeking quashing of the impugned decision of the Pilot Committee dated 29.10.2010 resulting in the impugned communication dated 1.11.2010 with the direction that the respondents should finalise the formal contract with the petitioner on the lines which were indicated in the bid document and notice inviting tenders.

12. Notice to show cause was issued on 15.11.2010 by this Court when learned counsels for the respondents were represented. It was directed on the stay application that no fresh contract will be awarded without leave and liberty of this Court and that the records relating to the decision making process of the Pilot Committee be produced in the Court on the next date of hearing.
13. An application came to be filed by respondent No.2 on 18.11.2010 stating that the counsel for the said respondent could not be given advance instructions prior to the first date of hearing that when the decision was taken by the Pilot Committee on 29.10.2010 to disengage the services of the petitioner, simultaneously a decision was taken to entrust the work to M/s. Alpcord Network, New Delhi as the new event management agency and an Expression of Interest had been issued to the said party vide letter dated 12.11.2010. M/s. Alpcord Network was L-2 whereas the petitioner was L-1 in the tender process. Subsequently, even the counter affidavits were filed by both the parties.
14. The counter affidavit of respondent No.2 states that in pursuance to instructions of the Pilot Committee with a view to negotiate the process of holding of the fair, notice inviting tenders had been issued resulting in the Expression of Interest in favour of the petitioner on 9.9.2010. A

preliminary objection is sought to be raised about respondent No.2 being a company under Section 25 of the Companies Act and thus not being a State within the meaning of Article 12 of the Constitution of India though that aspect was never urged during the hearing and rightly so. It is a Government fair, financed by the Government and certainly exercise of jurisdiction under Article 226 of the Constitution of India could not have been prohibited.

15. The other aspect urged in the affidavit is that the Expression of Interest vide letter dated 9.9.2010 was subject to finalization of the agreement, terms & conditions and financial bids. The MoU was sent to the petitioner who chose not to sign the same. It has been averred that hardly any work had been carried out by the petitioner except preparation of the logo and that the attitude of the petitioner from the beginning was of non co-operation. Repeated efforts to have discussions with the Director had not proved to be fruitful and the time was running out as the fair is in February, 2011. Repeated complaints are stated to have been made which are evident from the letter dated 20.10.2010. The hue and cry about dubious deals in Commonwealth Games had resulted in respondent No.2 being cautious. The decision was taken finally by the Pilot Committee.
16. It has also been emphasized that a crucial joint meeting was to be held on 27.10.2010 in pursuance to e-mail dated 26.10.2010 yet the Director of the petitioner did not attend the meeting. Only Mr. R.K. Jain, Consultant from the petitioner company came. The non co-operative attitude of the petitioner was brought to the notice of the Pilot Committee. A decision was stated to have been taken by the Pilot

Committee in the best interest of the fair and it was decided to engage the services of L-2 with payment being restricted to what was being paid to the petitioner. A decision was also taken that any work done by the petitioner till date of disengagement, should be duly compensated as per the terms of the bidding. This decision was communicated to the petitioner vide letter dated 1.11.2010.

17. A separate affidavit has been filed by respondent No.1/Union of India by one Mr. J.P. Dutt, Under Secretary in the Ministry of Textiles. The said affidavit seeks to support the stand of respondent No.2. The Pilot Committee is stated to be constituted consisting representatives of all participating Councils and senior officers of the level of Joint Secretary of the Ministry of Textiles. In paras 6 & 7 of the affidavit serious allegations were made against the petitioner to the effect that they had not been able to discharge their obligations with promptitude and exactitude. The petitioner is stated not to have been functioning in the orderly manner coupled with their reluctance to sign the agreement thereby causing undue delay which was detrimental to the mega show. The decision to disengage the petitioner is stated to have been taken due to the pathetic and unprofessional behavior of the petitioner.
18. The agenda item and the decision taken by the Pilot Committee in its meeting held on 29.10.2010 filed by respondent No.2 is being reproduced hereinunder to appreciate its effect:

“07. To discuss continuing appointment of M/s. Meroform after IT/ED raids on their firm.

SG, AEPC informed the house that M/s. Meroform (I) Pvt. Ltd. has been given expression of interest letter for appointment as event management agency for the Tex-Trends India 2011. An

MOU has been sent to them but they have not signed the same till date.

He further informed that a letter had been sent to M/s. Meroform after the news of raids appeared in various newspapers, television towards the work done after Common Wealth Games (CWG). IN response to the letter, M/s. Meroform India (P) Ltd. had replied vide their e-mail dated 22nd October, 2010 wherein they had indicated that the enquiries are being conducted on many companies who are involved in making of the CWG project. Further the agency had indicated that the CWG contract is on GL Litmus Events P. Ltd. in which M/s. Meroform India P. Ltd. is a shareholder in the consortium. The agency also indicated that they had a separate dedicated team who would execute the jobs of Tex Trends India 2011 fair.

SG, AEPC further informed that the senior persons from the agency (M/s. Meroform (I) Pvt. Ltd.) are not attending briefing meetings.

After detailed deliberations, the Committee decided to disengage the services of M/s. Meroform (I) Pvt. Ltd. in view of the raids conducted by Enforcement Directorate for the works conducted by the agency for the Common Wealth Games and also decided to appoint M/s. Alpcord Network, New Delhi as the event management agency for the fair.

It was also decided that the earlier agency M/s. Meroform (I) Pvt. Ltd. shall be reimbursed of the actual expenses incurred by them after due auditing.”

19. On a reading of the aforesaid decision it is quite clear that the only reason stated for the Committee to take the decision to disengage the services of the petitioner is in view of the raids conducted by the Enforcement Directorate for the works conducted by the agency (GL Litmus Events Pvt. Ltd. in which the petitioner company was a shareholder in the Consortium) for the Commonwealth Games. It is in this context that it was put to the respondents as to how they could justify filing affidavit setting out pleas for disengaging the services of the petitioner which never formed basis of any decision or communication. In this behalf the allegations in the affidavit of

respondent No.1 filed by Mr. J.P. Dutt were serious in nature as they showed non-performance of the task by the petitioner and alleged unprofessional conduct. They were extremely negative on the functioning of the petitioner and thus, it was asked as to what was the record on the basis of which such conclusion could be drawn. There was, in fact, no such record.

20. We had heard learned counsels for the parties on 7.12.2010 and finally reserved the judgement on 9.12.2010. Learned counsel for respondent No.1 mentioned the matter on 10.12.2010 and sought leave to file an affidavit to withdraw certain allegations made in the counter affidavit of the said respondent. We permitted the affidavit to be taken on record. The affidavit seeks to withdraw the allegations of apathetic and unprofessional behaviour made against the petitioner. It further states that the deposition in the affidavit was not the personal knowledge but knowledge gained from records regarding non-discharging of functions by the petitioner with promptitude and exactitude as referred to in para 6. The verification is also, thus, sought to be withdrawn.
21. We want to express our strong disapproval of the manner of filing affidavits by the officer concerned, Mr. J.P. Dutt, Under Secretary. To say the least it is highly irresponsible. He had no personal knowledge of anything yet sought to file the affidavit on the basis of personal knowledge. He had made serious allegations against the petitioner to justify the decision taken by the respondents which allegations are not borne out of the record but are a complete figment of imagination of the deponent. Even the averments made in para 6, which are now stated to be based on records are again unsupported by any record, as

the sole basis of any decision taken by the Pilot Committee was arising from the news reports about the raids on another company (in which the petitioner was a shareholder), by the Enforcement Directorate. It was open for the respondents to have justified their actions on the basis of the reasons contained in the impugned letter. It is highly improper for them to make it a personal issue to justify the same when it was actually not so. We would have proceeded further against this officer but for a subsequent affidavit. We still consider it appropriate to caution this officer to act with greater responsibility in future and for a Joint Secretary in the Ministry concerned to look into the matter as to how affidavits are filed not based on record and in the absence of any personal knowledge.

22. The conspectus of the aforesaid facts as we noticed above show that the only basis for the decision to terminate the arrangement with the petitioner is in pursuance to what the Pilot Committee had recorded on 29.10.2010 which is the sole basis of the decision and thus what has to be considered is as to whether the factum of there being raids by the Enforcement Directorate in respect of another company in which the petitioner company is a shareholder in the Consortium could be a good ground for the respondents to withdraw the contract from the petitioner.
23. The answer to the aforesaid question, in our considered view, is emphatically in the negative. The allegations of the petitioner not performing the task appear only as an afterthought in the affidavits to justify their action. There is no material to show that the petitioner could not perform its task of executing the contract or there was any

reason for such apprehension. The petitioner has already averred in the petition about the various contracts which the petitioner is performing including with Government agencies. The petitioner happened to be a part of the Consortium in the name of another company having a stake in it where Enforcement Directorate raids were carried out. This can hardly be a reason for termination of the contract/arrangement with the petitioner. The decision of termination, thus, based on this reason is unsustainable.

24. We also find that the allegation of the petitioner not executing the formal contract and delaying the same is a red herring. The letter appointing the petitioner as an event management agency subject to finalization of the agreement, terms & conditions was issued as far back as 9.9.2010. In pursuance to the same the petitioner is stated to have been asked to commence work and the various e-mails exchanged and placed on record show that work was started by the petitioner and interaction was taking place with respondent No.2. Learned counsel for respondent No.2 initially sought to give an impression as if the draft agreement was sent along with a letter dated 9.9.2010. However, learned counsel for the petitioner rightly drew our attention to the concerned e-mail to point out that this agreement was sent only on 10.10.2010, month after the initial letter. Learned counsel for respondent No.2, thus, conceded this aspect. The petitioner promptly replied to the same vide e-mail dated 15.10.2010 and yet there was no response from respondent No.2 till 20.10.2010. The letter dated 20.10.2010 itself shows that the basic reason for the said communication is the raids by the Enforcement Directorate and a tail

was sought to be added to it or non-execution of the formal agreement.

The letter was appropriately replied to by the petitioner on 22.10.2010 itself.

25. We are, thus, clearly of the view that it is a case of wrongful termination of contract awarded to the petitioner.
26. The question, however, arises as to what relief the petitioner would be entitled to in such a situation. We posed a question to learned counsel for the petitioner whether in such a case would it not be appropriate that the petitioner claim damages for wrongful breach of the contract and as to whether respondent No.2 should be compelled to continue to get the contract executed from the petitioner. In this behalf learned counsel for the petitioner relied upon the judgement of the Supreme Court in ABL International Ltd. &Anr. Vs. Export Credit Guarantee Corporation of India Ltd. & Ors. (2004) 3 SCC 553. Learned counsel invited our attention to the observations made in paras 10 & 13, which read as under:

“10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in *K.N. Guruswamy v. State of Mysore*¹ was followed subsequently by this Court in the case of *D.F.O. v. Ram Sanehi Singh* (1973) 3 SCC 864 wherein this Court held:

“By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the source of the right which the respondent claims *was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ.* In view of the judgment of this Court in *K.N. Guruswamy case* (AIR 1954 SC 592) there can be no doubt that the petition was maintainable, even

if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.”

(emphasis supplied)

.....

“13. We do not think this Court in the above case has, in any manner, departed from the view expressed in the earlier judgments in the case cited hereinabove. This Court in the case of *LIC of India*⁵ proceeded on the facts of that case and held that a relief by way of a writ petition may not ordinarily be an appropriate remedy. This judgment does not lay down that as a rule in matters of contract the court’s jurisdiction under Article 226 of the Constitution is ousted. On the contrary, the use of the words “court may not ordinarily examine it unless the action has some public law character attached to it” itself indicates that in a given case, on the existence of the required factual matrix a remedy under Article 226 of the Constitution will be available. The learned counsel then relied on another judgment of this Court in the case of *State of U.P. v. Bridge & Roof Co. (India) Ltd.*(1996) 6 SCC 22 wherein this Court held:

Further, the contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration. The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy — in this case, provided in the contract itself — is a good ground for the court to decline to exercise its extraordinary jurisdiction under Article 226.”

27. Learned counsel for the petitioner, thus, contended that even in matters of contract an aggrieved party can approach the Court under Article 226 of the Constitution of India and the Court is empowered to grant relief.
28. The next question, thus, is as to whether in the facts of the present case a writ ought to be issued and if so, the form of the writ. We have already come to the conclusion that the decision taken by the Pilot Committee on 29.10.2010 is unsustainable in law and the facts of the case. However, a direction to get the contract executed from the petitioner by the respondents would amount to a specific enforcement

of the arrangement/agreement between the parties. No doubt if the petitioner does not execute the contract, wrongful loss would be caused to the petitioner but it would be difficult for us to quantify the extent of loss/damage of the petitioner. If such loss/damage is the appropriate remedy then it would not be permissible to specifically enforce the contract.

29. We are reinforced in our view by judgments of the Supreme Court. In Noble Resources Ltd. v. State of Orissa & Anr., (2006) 10 SCC 236, the plea that contractual matters are beyond the realm of judicial review was negated though it was observed that the application may be limited. Similarly, the plea that there are disputed questions of fact or an alternative remedy is available was not treated as sufficient for the High Court to decline to exercise its jurisdiction. However, it was simultaneously observed in para 43 that ordinarily a specific performance of contract would not be enforced by issuing a writ of/or in the nature of mandamus particularly keeping in view the provisions of the Specific Relief Act, 1963 and damages may be an adequate remedy for breach of contract. If this principle is applied to the present case, we do find that though the action of the respondents of termination of contract cannot be sustained, the remedy would be by way of damages, which are best determined in suit proceedings where evidence can be led by the parties of the extent of damages.
30. We are also conscious of the fact that a similar Expression of Interest has been issued to a third party, which is L-2. The fair is in the month of February, 2011. The decision to award the contract was taken on 12.11.2010 and a month has passed since then. There are about two

months left for the fair. Though the petitioner claimed that it is geared to get the contract executed but then the time would be extremely short for the petitioner to execute the project and such an important event cannot be possibly jeopardized. To that extent we agree with the submission of the learned counsel for the respondents that at this stage it would not be appropriate to re-award the contract to the petitioner.

31. The result of the aforesaid discussion is that though we find that the decision taken by the respondents on 29.10.2010 is unsustainable, we are not inclined to issue a direction for the work to be carried out through the petitioner and relegate the petitioner to the remedy of civil suit to claim appropriate damages.
32. The writ petition is disposed of in the aforesaid terms and we consider it appropriate to burden both the sets of respondents with costs of ₹15,000.00 each.

SANJAY KISHAN KAUL, J.

DECEMBER 23, 2010
b'nesh

M.L. MEHTA, J.