

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C) 4951/2010 & CM No. 9800/2010

Reserved on: 10th February 2011

Decision on: 23rd February 2011

GREEN DELHI BQS LTD. Petitioner
Through: Dr. Abhishek Manu Singhvi, Senior
Advocate with Mr. Abhimanyu Bhandari,
Mr. Anubhav Singhvi, Ms. Aakanksha Munjhal
and Mr. Jaiveer Shergill, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ANR. Respondents
Through: Ms. Mini Pushkarna, Standing Counsel
for MCD.
Mrs. Avnish Ahlawat with
Mr. Nitesh Kumar Singh, Advocate for DTC.

AND

W.P.(C) 5428/2010 & CM No. 10682/2010

GREEN DELHI BQS LTD. Petitioner
Through: Dr. Abhishek Manu Singhvi, Senior
Advocate with Mr. Abhimanyu Bhandari,
Mr. Anubhav Singhvi, Ms. Aakanksha Munjhal
and Mr. Jaiveer Shergill, Advocates.

versus

DELHI TRANSPORT CORPORATION
..... Respondent
Through: Ms. Mini Pushkarna, Standing Counsel
for MCD.
Mr. Parag Tripathi, Senior Advocate with
Mrs. Avnish Ahlawat, Ms. Simran and
Mr. Nitesh Kumar Singh, Advocates for DTC.

CORAM: JUSTICE S. MURALIDHAR

- | | |
|--|-----|
| 1. Whether reporters of the local newspapers be allowed to see the judgment? | No |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

JUDGMENT
23.02.2011

Background facts

1. There are two writ petitions under Article 226 of the Constitution by Green Delhi BQS Ltd. (hereinafter ‘Green Delhi’). They arise in the context of a contract titled as a Concession Agreement (CA) entered into on 26th July 2007 between Green Delhi and the Delhi Transport Corporation (DTC) for the construction, operation and maintenance on Build Operate and Transfer basis of 225 Bus Queue Shelters (BQSs) under DOT-I (enhanced 248 BQSs) for a period of ten years. The broad features of the CA were that Green Delhi would erect the BQSs in accordance with pre-determined specifications at earmarked locations. Green Delhi was to pay DTC Rs. 93,800 per BQS as “concession fee”. Green Delhi would generate revenue through display of advertisements on the BQSs. The CA had clauses for dispute resolution first by a reference to the Chairman DTC, failing which by arbitration. The land on which the BQS was erected belonged to the MCD for which there was a revenue sharing arrangement between the DTC and the MCD.

2. On 31st March 2009 DTC wrote to Green Delhi listing out the defaults committed by Green Delhi in fulfilling its obligations under the CA. This was followed by a notice dated 1st May 2009 issued by the DTC for encashment of the performance security in terms of Article 16.2(a) of the CA. Green Delhi then filed Civil Suit (OS) No. 790 of 2009 in this Court seeking *inter alia* the following reliefs: (a) a mandatory injunction to the DTC to hand over 17 BQS sites to Green Delhi (b) a permanent injunction restraining DTC from claiming concession fees @ Rs. 93,800/- per BQS and to allow Green Delhi to deposit concessional fees @ Rs. 32,880/- per BQS and (c) to restrain the DTC from invoking the bank guarantees dated 22nd May 2008 for Rs. 4,22,10,000/- and 29th September 2008 for Rs. 2,11,05,000/-.

3. By an interim order dated 1st May 2009 a learned Single Judge of this Court restrained DTC from taking coercive steps against Green Delhi subject to Green Delhi depositing concession fees @Rs.32,880 per BQS. By a further interim order dated 5th May 2009, the encashment of bank guarantees furnished by Green Delhi to DTC in terms of the CA was stayed. On 5th April 2010 the learned Single Judge of this Court vacated the said interim orders, dismissed the interlocutory application for stay of invocation of the bank guarantees and reduction of the concession fees. Consequently, the learned Single Judge ordered that Green Delhi would pay the DTC within

eight weeks “the amount constituting the difference between the amounts paid in terms of the interim order of this Court and what is payable to the DTC under the contract.” DTC invoked the bank guarantees on 6th April 2010.

4. Green Delhi’s appeal against the said order dated 5th April 2010 was disposed of by a Division Bench on 15th April 2010 granting liberty to Green Delhi to approach the learned Single Judge again to challenge the invocation of the bank guarantees by the DTC on 6th April 2010. The application filed by Green Delhi challenging the invocation of the bank guarantee of 6th April 2010 was dismissed by the learned Single Judge on 19th April 2010. However, the encashment of the bank guarantees was kept in abeyance till 20th April 2010 in terms of the order dated 15th April 2010 of the Division Bench of this Court. Green Delhi’s appeal against the said order dated 19th April 2010 was dismissed by the Division Bench.

5. Consequent upon the above developments, the DTC by its letter dated 23rd April 2010 called upon Green Delhi to undertake the following steps:

“In view of the above, you are requested to take following actions under the contract immediately:

- i) Performance security for the remaining operation period for an amount equivalent to 3 months concession fee for 248 BQs under contract be deposited either through FDR in the

name of DTC or Bank Guarantee from a Nationalized Bank in favour of DTC.

ii) To pay the difference of original concession fee and reduced fee paid on account of the order dated 01/05/2010 of Single Bench of Hon'ble Delhi High Court along with interest. The High Court has vide its order dt. 5.4.10 directed payment of full license fee as per agreement.

iii) To pay the concession fee of the completed 48 BQSS w.e.f. 01.12.2008 to 30/04/2010 (bill enclosed).

iv) To pay the concession fee in respect of 248 BQSS in advance on quarterly basis as per Article No. 11.

v) To pay the license fee in respect of 200 BQS for the month of April, 2010 for which bill has been already submitted.

vi) To open the ESCROW Account as per Article No. 21.”

6. By letters dated 2nd June and 25th June 2010 respectively DTC reminded Green Delhi to cure the default and comply with the letter dated 23rd April 2010. By a letter dated 2nd July 2010 the DTC called upon Green Delhi to pay the differential amount of concession fees in terms of order dated 5th April 2010, to pay the concession fees in respect of 48 BQS from 1st February 2008 onwards, to pay the concession fees in respect of 248 BQS in advance on quarterly basis in terms of Article 11.1 of the CA along with concession fees for the months April, May and June 2010, to open an escrow account as per Article 21.1 of the CA and ensure the upkeep of the BQSS in terms of the maintenance manual.

7. By letter dated 13th July 2010 the Advertisement Department of the MCD asked Green Delhi to remove all advertisements on the 225 Bus Queue Shelters ('BQs') in terms of the contract awarded to it by DTC and deposit damage charges of Rs. 2,11,05,000/-. By another letter dated 19th July 2010 the MCD required Green Delhi to remove its display at the BQs near Maharani Bagh, Ring Road within two days and also deposit damage charges of Rs. 93,800/-.

The Writ Petitions

8. It is in the above background that the present petitions were filed by Green Delhi. Writ Petition (C) No. 4951 of 2010 was filed by Green Delhi seeking the quashing of the letters dated 13th and 19th July 2010 of the MCD. In the said writ petition, this Court had on 27th July 2010 passed an interim order restraining the MCD from taking any coercive steps against the Petitioner and its advertisers. Later, by a detailed order dated 17th January 2011, the interim order was vacated and the application for interim stay was dismissed. However, on the statement of learned Senior counsel for Green Delhi that Green Delhi would pay MCD Rs. 5 crores by 21st January 2011, the vacation of the interim order was kept in abeyance till 25th January 2011. Subsequently on 21st January 2011 on an application made by Green Delhi, it was directed to make payment of Rs. 5 crores on that date itself to the MCD. The said amount of Rs. 5 crores has since been paid by Green Delhi to the

MCD.

9. Writ Petition (C) No. 5428 of 2010 was filed by Green Delhi seeking the quashing of the letters dated 23rd April, 2nd June, 25th June and 7th July 2010 from DTC to Green Delhi. When this petition was first listed before this Court on 11th August 2010, Mr. Parag P. Tripathi, learned Additional Solicitor General ('ASG') appearing for the DTC objected to its maintainability by pointing out that the Petitioner's suit being CS(OS) No. 790 of 2009 was pending in this Court. On the next date, i.e., 13th August 2010 Dr. A.M. Singhvi, learned Senior Counsel appearing for the Petitioner stated that they would take steps to withdraw the said suit.

Order dismissing the Civil Suit as withdrawn

10. It appears that thereafter on 25th August 2010, the Petitioner filed an application being IA No. 11220 of 2010 under Order 23 Rule 1 CPC in CS (OS) No. 790 of 2009 praying that Green Delhi "be allowed to withdraw the above suit with liberty to pursue the proceedings in respect of the subject matter of the suit, if any, afresh." In the said application a reference was made to the filing of W.P. (C) No. 5428 of 2010 by Green Delhi.

11. It requires to be noticed that in the meanwhile the DTC had filed IA No. 9422 of 2010 in the said suit stating that Green Delhi had wilfully disobeyed the order dated 5th April 2010 passed by the learned Single Judge whereby it

had been directed to pay DTC, within eight weeks, the differential amount of the concession fees.

12. Both the applications in CS (OS) No. 790 of 2009 came up for hearing before the learned Single Judge on 26th August 2010. The following order was passed by the learned Single Judge:

“I. A. No. 11220/2010 (Under Order 23 Rule 1)

Learned counsel submits that the suit may be permitted to be withdrawn with liberty to urge the pleas, if required, in some other proceedings. This is objected to by the defendant, who submits that the liberty as sought cannot be granted but that it is open to the plaintiff to pursue any other claim independent of the subject matter of the present suit.

In view of the above, the suit is permitted to be withdrawn. The plaintiffs right to pursue remedies in respect of causes of action which were not covered in the present suit (i.e. not covered by para 55 of the suit which the relief clause is indicated in paras 58(i) to (viii) of the suit) are, however, reserved. I.A. No. 11220/2010 is allowed in the above terms.

I.A. No. 9422/2010

The office is directed to register the application as a contempt petition. Issue notice. Sh. Gopal Jain, Advocate accepts notice in the contempt proceedings on behalf of plaintiff. Ms. Manjira Dasgupta, Advocate accepts notice on behalf of the Defendant No. 2 Sh. Milanka Chaudhary, Advocate accepts notice on behalf of the Defendant No. 3.

The reply to the proceeding shall be filed within four weeks.

CS(OS) 790/2009

The suit is dismissed as withdrawn, in terms of the order made in the I.A. No. 11220/2010.
Order dasti.”

13. Thereafter when the writ petition was listed before this Court on 31st August 2010 learned Senior counsel appearing for the Petitioner stated that DTC would be furnished with the calculations as per the principal amount and interest due to the DTC. It was further stated that in order to demonstrate its bonafides in seeking the activation of the mechanism as envisaged in clauses 19.1 and 19.2 of the CA “the Petitioner will pay to the DTC the balance of the principal amount as indicated in its calculations.” Thereafter, the parties exchanged their calculations. However, there was a huge gap between the figures and there appeared to be no possibility of the Petitioner Green Delhi being prepared to pay even the principal amount which the DTC claimed is due to it. Consequently, the parties have been heard at length.

Submissions on behalf of Green Delhi

14. Dr. A.M. Singhvi, learned Senior counsel appearing for Green Delhi submitted that:

(i) The suit CS(OS) No. 790 of 2009 filed by Green Delhi prayed for a very different sets of reliefs. The present petition arose out of a fresh cause of action which was not the subject matter of the suit. Therefore, the principles of *res judicata* would not apply.

(ii) The order dated 26th August 2010 passed by the learned Single Judge permitted Green Delhi to pursue remedies in respect of “causes of action” not covered in the present suit. Therefore, the present writ petition, which did not cover the cause of action in the suit was maintainable.

(iii) The principles of *res judicata* would not apply where the initial proceeding was a civil suit and the subsequent proceeding was a writ petition. What is barred is only a subsequent suit on the same cause of action.

(iv) DTC has already recovered Rs. 6.31 crores by way of encashment of bank guarantees. Rs. 5 crores was paid to the MCD and a sum of Rs. 6 crores thereafter to the DTC. In terms of the impugned order in W. P. (C) No. 4951 of 2010 another sum of Rs. 5 crores was paid to the MCD. The directions of the learned Single Judge in the order dated 5th April 2010 were fully complied with and, therefore, Green Delhi was not in contempt of the said order.

(v) There was an *inter se* dispute between the MCD and the DTC with the latter not sharing the revenue generated by it out of the CA with the MCD. The Petitioner Green Delhi should not be made to suffer on that count.

(vi) The clauses of the contract were inherently unjust and arbitrary and in similar circumstances the Supreme Court in ***Union Territory of Pondicherry v. P.V. Suresh (1994) 2 SCC 70*** held that it was possible for the Court to issue directions rendering the contract workable. This did not amount to rewriting the contract itself. Green Delhi was the largest contributor of revenue to the DTC. Moreover, the DTC had not yet terminated the CA.

(vii) Green Delhi should be permitted to make a representation to the Chairman, DTC. Alternatively, the parties should be referred to arbitration

by a retired Judge of this Court to be nominated by the Court. It is not possible for Green Delhi to agree to either of the mechanisms set out in Articles 19.1 and 19.2 of the CA as they were also inherently unfair and unjust.

Submission on behalf of DTC and MCD

15. Appearing for the Respondent DTC Mr. Parag Tripathi, learned ASG refers to the interim order dated 1st and 5th May 2009 in terms of which Green Delhi was permitted to pay the concessional fees of Rs. 32,800/- per BQS rather than the contracted amount of Rs. 93,800/-. That interim order continued till 5th April 2010 when it was vacated by the learned Single Judge with a direction to Green Delhi to pay the differential amount for the entire period to the DTC within eight weeks. That amount according to Mr. Tripathi has not been paid till date. Faced with a situation where it was unable to comply with the said direction, and further with the appeal against the said order having been dismissed as withdrawn, Green Delhi decided to file the present writ petition. When it appeared that this Court would not entertain the writ petition as long as the suit was pending, Green Delhi decided to withdraw the suit. Drawing a comparison between the prayers in the writ petition with the prayers in the suit, which was dismissed as withdrawn, Mr. Tripathi submitted that the same issues were being agitated again in the writ petition for which no liberty had been granted by the learned Single Judge.

16. Distinguishing the judgment in *P.V. Suresh*, Mr. Tripathi submitted that the said case concerned a statutory contract under the local excise law, for running a liquor vend and no comparison could be drawn between the said contract and the CA which formed the subject matter of the present writ petition. He further submitted that in fact the Petitioner was seeking a rewriting of the contract. Even the decision in *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd. 2004 3 SCC 553* did not permit such a course to be adopted by a High Court exercising jurisdiction under Article 226 of the Constitution.

17. Mr. Tripathi submitted that the Petitioner has benefitted from the interim order of the Court for almost one year and, thereafter, chose not to comply with the directions of this Court issued to it while vacating the interim order. Therefore, it ought not to be heard in the subsequent proceedings. In other words, the conduct of the Petitioner disentitled it to any relief, much less an equitable relief.

18. Ms. Mini Pushkarna, learned counsel appearing for the MCD submitted that the Petitioner was bound to ensure that the display of advertisements on the 248 BQS was consistent with the policy of the MCD. This was an implied clause of the CA entered into by Green Delhi with the DTC. She

referred to Article 4.2 of the CA read with the definition of the ‘applicable laws’ under Article 1.1 thereof. She submitted that there was no case made out for interference with the impugned letters written by the MCD to Green Delhi.

Maintainability of the writ petitions

19. The first point to be considered is the maintainability of the writ petitions. In exercise of its powers under Article 226 of the Constitution, the High Court will generally refrain from examining disputed questions of facts particularly when they arise in the realm of contracts. Since extensive reliance in this regard has been placed on the decision in ***ABL International Ltd.***, the facts in the said case require to be discussed. The case arose out of the repudiation by the insurance company of a claim made by the insured for losses suffered in a contract of export. From para 53 of the said judgment, it is apparent that the Supreme Court was of the view that there was no disputed question and that as regards interpretation of the contract it did not require “any external aid much less any oral evidence.” Further, in para 55 it was held on facts that “the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent.” Further, it was nobody’s case that the “contracts in question were obtained either by fraud or by misrepresentation.” The observation that even in a contractual dispute, where a challenge is made on ground of violation of Article 14, the writ court could interfere, has to be understood in the above factual background.

20. In the instant case, Green Delhi contends that two critical terms of the contract – the concession fee and the clause concerning dispute resolution - are inherently unjust. As regards the pre-determined concession fee of Rs. 93,800/- per BQS in terms of the CA, the contention is that it is exorbitant and that DTC ought not to charge more than Rs. 32,880/- per BQS. In other words Green Delhi does not want to adhere to the clause in the CA concerning the concession fee. It wants it to be re-written. In ***ABL International Ltd.*** the fact situation was entirely different. The parties there were not questioning the very terms of the contract. In fact the Petitioner there was seeking enforcement of the contract.

21. Turning to the decision in ***P.V. Suresh*** it is seen that the Supreme Court there was concerned with certain clauses in a statutory contract in the form of a licence issued for a liquor vend under the local excise law. In para 9 of the said decision the factual context is explained. It was noticed that the Petitioners in the said case had, under the interim order of the High Court, continued their business through the entire excise year. Therefore, what remained at the stage when the matter was heard in the Supreme Court was to “devise a formula appropriate to the circumstances.” The Supreme Court added: “The situation herein is undoubtedly exceptional and unusual which in turn calls for an unusual solution.” In this background, in para 11 it was

observed as under:

“11. In the circumstances of this case, our enquiry is limited to the question whether the contract was so constructed that loss was inherent and implicit in it; if so, it ought to be modified. **Otherwise, the Court has no jurisdiction to alter the terms or rewrite the contract between the parties.**” (emphasis supplied)

22. Thereafter in para 12, directions were given to the State Government to revise the ‘kist’ amount to such a figure as would in all circumstances ensure a margin of 15% of the annual bid which would in turn take care of the establishment expenses and also include profit.

23. In the considered view of this Court, no comparison can be drawn between the facts in *P.V. Suresh* and the present case. The CA in the instant case was arrived at after negotiations between the parties. It was entered into by Green Delhi voluntarily. This was a business decision taken by it. The clause fixing the concession fee as Rs. 93,800/- per BQS cannot *per se* be held to be arbitrary and on that basis reduced to a figure that Green Delhi considers ‘reasonable’. This is outside the scope of the powers of this Court under Article 226. In *Assistant Excise Commissioner v. Issac Peter (1994) 4 SCC 104* a three-Judge Bench of the Supreme Court rejected a similar plea in relation to statutory contracts and observed (SCC, p.124):

“Doctrine of fairness of the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the

Rule of Law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, **the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties.**” (emphasis supplied)

24. In *Isaac Peter*, the Supreme Court proceeded to observe (SCC, p.125):

“We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, **there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a business for the licencees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the Contract. It is not as if the licencees are going to pay more to the State in case they make substantial profits.**”

(emphasis supplied)

25. As regards the actions of DTC and MCD which Green Delhi is aggrieved by, it is not as if it has no efficacious remedy other than approaching this Court in a writ petition under Article 226. As already noticed, Green Delhi did file a suit in this Court in the first instance in which an interim order was passed in its favour permitting it to pay Rs. 32,880/- per BQS as an interim measure. The Court had, while vacating the said interim order on 5th April 2001, issued directions to Green Delhi to pay the differential amount to the DTC within eight weeks. However, Green Delhi was unable to comply with the terms of the said order dated 5th April 2010. This led to the filing of an application by the DTC which has been directed by the learned Single Judge to be treated as a contempt petition and is pending consideration.

26. In the above background, it is not possible to accept the contention of Dr. Singhvi that the subject matter of the present petition is entirely different from the subject matter of the suit. The letters of the DTC, which are under challenge in the writ petition, emphasise that Green Delhi should adhere to the terms of the CA and pay the amounts due to DTC in terms thereof. Green Delhi questions the fairness and reasonableness of the terms of the CA by invoking Article 14. It was the alleged unreasonableness of the terms of the CA that led to Green Delhi filing the suit. The prayers in the suit in effect

were to restrain the DTC from enforcing the terms of the CA concerning the concession fee. The hairsplitting done of the expression “causes of action” in this Court’s order dated 26th August 2010 and the interesting questions on the applicability of the principles of *res judicata* do not take away the justified criticism of the conduct of Green Delhi in abandoning the suit and filing the present writ petitions when the conditions for pursuing the suit became difficult for it to comply with. The jurisdiction under Article 226 being discretionary, the conduct of the Petitioner seeking relief thereunder is relevant.

27. A further reason why this Court is not inclined to entertain these writ petitions is that the CA provides for dispute resolution in Articles 19.1 and 19.2 thereof. Again it is not for this Court to re-write these clauses or hold them to be arbitrary or unreasonable. They form the part of the CA which is not yet terminated by either DTC or Green Delhi. In exercise of its powers under Article 226 of the Constitution this Court cannot direct that the mechanism envisaged in the CA for resolving the disputes of the parties thereto should be abandoned and a new arrangement put in place. If Green Delhi is aggrieved by any of the action of the DTC it is for Green Delhi to invoke first Article 19.1 and failing that the mechanism under Article 19.2 of the CA.

28. As regards the demand raised by the MCD, Article 4.2 of the CA requires Green Delhi to “familiarize itself with and be solely responsible for compliance with all Applicable Laws including specifically in respect of display of advertisements.” Under Article 1.1, Applicable Laws are defined as under:

“**Applicable Laws** means all laws, promulgated or brought into force and effect and all Rules and Regulations made and all Notifications and Guidelines issued there under by the Government of India, Government of National Capital Territory of Delhi, MCD, DTC, Statutory Authorities and other local bodies including all judgments, decrees, injunctions, writs and orders of any court of record, as may be in force and effect during the subsistence of this Agreement.”

29. Green Delhi, therefore, cannot plead that it was not aware of its obligation to comply with the rules and regulations of the MCD. This was an express term of the CA. The subject matter of the letters impugned in the writ petition against MCD involves disputed questions of fact which this Court cannot examine in a petition under Article 226 of the Constitution.

30. For all the above reasons, this Court declines to entertain these writ petitions. The writ petitions are accordingly dismissed. The interim order stands vacated. The pending applications are dismissed. It is however clarified that this order will not preclude the parties from seeking redress

through other appropriate remedies they may have in law, uninfluenced by any observation on merits made in this order.

S. MURALIDHAR, J.

FEBRUARY 23, 2011

ak