

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

Judgement reserved on: 16.01.2014

% **Judgement delivered on: 21.04.2014**

+ **O.M.P. 1139/2013 & I.A. No.21266/2013**

SHONKH TECHNOLOGIES INTERNATIONAL LTD. & ANR.

..... Petitioner

Through: Dr. A.M.Singhvi, Sr. Advocate, Mr. Sandeep Sethi, Senior Advocate along with M/s Chinmay Sharma, Meghna Mishra, Simran Brar, Rohan Sharma, Akhil Sahai, Mohit Mudgal & Rubin Klar, Advocates

versus

GOVERNMENT OF NCT OF DELHI

..... Respondent

Through: Mr. Gaurab Banerjee, ASG along with Mr. Amiet Andlay, Advocate.

**CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI**

JUDGEMENT

VIPIN SANGHI, J.

1. The petitioner No.1 entered into a concession agreement with the respondent GNCTD for undertaking the service of providing 'Vehicle Registration Certificates' (VRC) in all the Motor Licensing Offices (MLO) offices and at the Headquarter Office of the respondent at Under Hill Road,

Delhi. Petitioner No. 2 was engaged by petitioner no. 1 as a consortium partner for execution of the said VRC project.

2. Vide communication dated 29.10.2013, the respondent terminated the agreement on the ground that the petitioners were not discharging their obligation under the concession agreement dated 20.06.2003.

3. Consequently, this petition was preferred under Section 9 of the Arbitration and Conciliation Act, 1996 (the Act), by the petitioner to nullify the effect of the order dated 29.10.2013 passed by the respondent seeking to terminate the petitioner's concession agreement. The petitioners also seek a restraint against the respondent from engaging any third party to render the services of issuance of Vehicle Registration Certificates (VRC) in MLOs as well as at the respondent's Headquarter Office at Under Hill Road, Delhi. The petitioners seek restraint against the respondent from awarding any tender or contract to any third party, or entering into any arrangement with any third party for issuance of VRCs in all the MLOs in Delhi, as well as at the Headquarter. Certain other injunctive reliefs have also been sought.

4. On 20.11.2013, the court issued notice on the petition to the respondent returnable on 26.11.2013. On 26.11.2013, the respondent appeared through counsel, who, inter alia, stated that the arrangement between the parties had come to an end by efflux of time. The respondents counsel further stated that the respondent is in a position to put in place an alternative arrangement for issuance of smart cards, for which purpose it has developed in-house technical ability. The court, while observing that the issue whether any interim order could be issued in favour of the

petitioners – in view of the fact that the contract stands terminated, would require consideration, granted interim relief to the petitioner “*for the time barely from the point of view of not having the citizen inconvenienced, ...* ”. The following arrangement was put in place, “*as the respondent itself has contended that it would require, at least, two weeks to put an alternative arrangement in position.*”

(i) *The petitioners will clear the backlog, if any, vis-a-vis pending requests for issuance of smart cards, in all zones and headquarter, in which, they are presently rendering service, within two weeks from today.*

(ii) *The petitioners will continue, for the moment, to collect the fee, subject to the obligation to supply the smart cards to the customers concerned being fulfilled within the stipulated period of four (4) days.*

(iii) *It is made clear that in case the petitioners were to fail, in discharging their obligations, then the respondent, in terms of order dated 06.06.2013, would be entitled to collect the fee in the relevant zones and/or the head quarter.*

(iii)(a) *Mr Subramaniam adds that if there is a breach by the petitioners, there would be no resistance to the collection of fee by the respondent.*

(iv) *Needless to say, in so far as collections made in terms of condition no. (ii) is concerned, the monies to be paid to the petitioners, if any, would abide by the terms of the agreement obtaining between the parties”.*

The aforesaid arrangement continues to operate.

5. On 16.01.2014, when the matter came up before the court, the following order was passed:

“This petition has been preferred under Section 9 of the Arbitration and Conciliation Act, 1996, to nullify the effect of order dated 29.10.2013 passed by the respondent seeking to terminate the petitioners concession agreement. The petitioner also seeks a restraint against the respondent from engaging any third party to render the services of the issuance of Vehicle Registration Certificates (VRC) in Motor Licensing Offices (MLOs) as well as at the respondent’s Headquarter Office at Under Hill Road, Delhi. The petitioners seek restraint against the respondent from awarding any tender or contract to any third party or entering into any arrangement with any third party for issuance of VRCs in all the MLOs in Delhi as well as at the headquarter. Certain other injunctive reliefs have been sought.

The Court had issued notice on the petition on 20.11.2013 returnable on 26.11.2013. On 26.11.2013, the respondent appeared through counsel and advanced the submission that the petitioner was not discharging its obligation under the concession agreement dated 20.06.2003 and that, consequently, a decision was taken to terminate the agreement vide communication dated 29.10.2013. The alternative submission of the respondent was that the arrangement has come to an end by efflux of time. The respondent stated that it is in a position to put in place an alternative arrangement for issuance of smart cards for which it had developed an in-house technical ability. Since the respondent stated that it would take at least two weeks to put an alternative arrangement in place, the Court permitted the petitioner to continue to operate the services. The petitioner is continuing to operate the services even now.

In case the concession agreement has come to an end by efflux of time – as contended by the respondent, in my view, there is no other aspect that needs consideration in this petition under Section 9 of the Act, since this Court is not really concerned with the merits of the dispute and it would be for the Arbitral Tribunal to go into the said disputes. Further consideration of this petition would be necessary by this Court only in case the

Court were to, prima facie, find that the agreement has not come to an end by efflux of time. On this aspect, the submission of the petitioner is, on the interpretation of clause 1.1.7, that the duration of five years would have to be computed from 20.04.2012. On the other hand, the submission of the respondent is that the term of the concession agreement has come to an end by efflux of time, since the contract has run for nearly nine years – as opposed to five years, and the petitioner has achieved the minimum number of smart card registrations as contemplated under the Agreement. Arguments have been advanced on both sides on the basis of the contractual clauses.

At this stage, I have heard arguments of learned counsel for the parties confined to the aforesaid aspect. Orders reserved.

Interim arrangement as already operating shall continue till the order is pronounced”.

6. Learned senior counsel for the petitioner submits that the duration clause contained in clause 1.1.7 of the concession agreement was amended on 30.12.2013. The original duration clause 1.1.7 reads as follows:

“Duration means 5 years from the date of the initial commencement of the services in all the 10 MLO offices and at the headquarter office in Under Hill Road, Delhi where the vehicle registration are presently undertaken or 5 years 6 months from the date of signing of this agreement, whichever is earlier”.

7. After amendment the above clause reads as follows:

“Duration means 5 years from the date of the initial commencement of the services in all the MLO offices and at the headquarter office at Under Hill Road, Delhi where the vehicle registration is presently undertaken.”

8. Learned counsel for the petitioners submits that the intent behind the said amendment was to prolong the tenure, as the words “*whichever is earlier*” used in the original clause were deleted. He submits that the term “service” as defined under clause 1.1.30, represents “all services” that are required to be offered under the contract.

9. He submits that the service of issuing the VRC at the headquarters started from 20.04.2012. In this regard, he places reliance on the communication dated 04.04.2012 of the respondent which shows that the date of commencement of the VRC services from the headquarters, even according to the respondent, was 15.04.2012. He submits that the duration of five years would, therefore, have to be counted from 15.04.2012 and would continue till 14.04.2017 on account of the amendment to the concession agreement, as aforesaid.

10. On the other hand, the submission learned counsel for the respondent is that there are two kinds of services envisaged to be rendered by the petitioner under the concession agreement. The concession agreement provided in Recital D that:

“D. After reviewing the technical and commercial proposals received from Shonkh and other bidders GNCTD has selected Shonkh to provide the services concerning the issue of Smart Optical Cards based Vehicle Registration Certificates and GNCTD has issued a letter of intent dated 30th September, 2002 to Shonkh”.

(Emphasis supplied)

11. The expression “service” is defined in clause 1.1.30 to mean “*provision of all the services indicated which is to be provided by Shonkh to*

the GNCTD for the project on the terms and conditions detailed herein". Clause 5 enlists the petitioners obligation under the agreement as including those enumerated in sub clauses (i) to (xiv). Clause (i) enlists the services *"in regard to issue of smart optical cards specified in Annexure-C"*. Clause 5(iii) enlists the service to be provided by the petitioner Shonkh to the GNCTD. It obligates Shonkh to provide *"to GNCTD reports on the services performed by Shonkh every month during the tenure on the format decided by the GNCTD"*.

12. He submits that the services to be provided under the agreement, therefore, include services to be provided to the consumers against a charge i.e. issuance of VRC on smart optical cards, and it also included services to be provided to the respondent GNCTD in the form of submission of reports every month in the format decided by GNCTD.

13. Learned counsel for the respondent submits that it was not necessary that the entire gamut of services envisaged under the concession agreement were required to be provided at every location i.e. at every MLO and at the headquarter. The respondent submits that the petitioner started rendering services to the public against requisite fee at 14, and not 10 locations, as originally envisaged. So far as respondent is concerned, it started receiving records at its headquarter from the initial stage itself in the form of reports. He submits that the petitioner is seeking to take advantage of the fact that the petitioner was called upon to issue VRCs in respect of commercial vehicles at the headquarters vide letter dated 04.04.2012 with effect from 15.04.2012. The submission of the respondent is that it cannot be said no service was being rendered by the petitioner at the respondents

headquarters prior to 15.04.2012.

14. Having heard learned counsels for the parties, I am of the, prima facie, view that the concession agreement has come to an end by efflux of time. As noticed above, Recital-D of the concession agreement shows that the petitioner was engaged to provide services “*concerning the issue of smart optical cards based*” VRCs. The parties were, therefore, conscious that the scope of the services to be rendered by the petitioner was not merely the issuance of smart optical cards based VRCs, but to provide services concerning the same. The expression “service” defined in clause 1.1.30 means provision of “*all the services indicated which is to be provided by Shonkh to the GNCTD for the project on terms and conditions detailed herein*”. The expression “all the services” would, therefore, includes services to be rendered not only to the vehicle owners/registrants but also to the respondent. Clause 5 of the concession agreement defines the petitioners obligations under the agreement inclusively, by using the expression “*Shonkhs obligation under this agreement shall include the following:*”. (emphasis supplied)

15. It enlists the obligations and services to be provided by the petitioner not only to the consumers directly, namely by issuing smart optical cards VRCs, but also services to be rendered by the petitioner to the respondent GNCTD, inter alia, in the form of submitting reports on the services performed by it on a monthly basis in the format decided by the respondent. In para (v) of the affidavit filed by the respondent, the respondent has stated that the duration of five years has expired long back in respect of all the ten zonal offices for which agreement was entered into. It also referred to its

communication dated 20.11.2013, whereby the respondent had specifically refuted the contention of the petitioner contained in their letter dated 17.07.2013, wherein the petitioner had claimed that the validity of the concession agreement stood extended upto 2017. In the communication dated 20.11.2013, the respondent had, inter alia, stated:

“It is observed that against the commitment of the department in original agreement for continuing the agreement for a period of 5 years; starting the project at 10 zonal offices and at Headquarter office for issuance of 40 lacs optical smart cards for registration of vehicle more than 9 years had passed since start of project. Further, in 14 zonal offices (as against 10 zonal office and 1 headquarter office) the issuance of smart card based registration certificate is operational for more than 5 years and at headquarter office date related to smart card based registration certificate is being received since beginning of the project. It is also clear from the data available with the department that more than 58 lacs smart card based registration certificate for (illegible)

In view of the above, your plea that the period of validity extends upto 2017 is not found sustainable”

16. From the aforesaid, it would be seen that the stand taken by the respondent contemporaneously was that services had commenced at the headquarters inasmuch, as, the respondent was receiving the data related to smart card based registration certificates since the beginning of the project.

17. Prima facie, it appears to me that the fact that the petitioner was obliged to provide large number of services – to the customers and to the respondents, did not mean that the petitioner was obliged to provide all the services at all the MLOs and the headquarters for the duration to start running under the concession agreement. To test the proposition, if one

were to assume that the respondents were not to require the issuance of smart card based VRCs at the headquarters even in 2012, it would mean that the concession agreement would never come to an end. Such an interpretation would lead to an absurd result considering that the crux of the concession agreement, prima facie, appears to be that for the capital investment to be made by the petitioner, the petitioner was to get an opportunity to issue smart card based VRCs in respect of 40 lacs vehicles to recover its capital costs and profits. It was for this reason that the agreement gave the right to the petitioner to extend the duration of the contract, in case it was not provided the opportunity to issue smart card in respect of 40 lacs vehicles in the first five year period, or in the alternative to seek damages at the rate of Rs.50/- in respect of the shortfall. It is not in dispute that the petitioner has been enjoying the benefit of the concession agreement for nine years (in respect of 14 zonal offices as against 10 zonal offices and one headquarter office contemplated under the concession agreement) and had issue more than 58 lacs smart cards, as opposed to 40 lacs smart cards envisaged under the agreement.

18. In view of the aforesaid discussion, I am of the considered, prima facie, view that the concession agreement has indeed come to an end by efflux of time and, therefore, it is not necessary for this court to dwell into the aspect of validity, or otherwise, of the termination of the concession agreement by the respondents. Accordingly, this petition is dismissed and the interim orders stand vacated.

VIPIN SANGHI, J

APRIL 21, 2014