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

+ **W.P.(C) 6217/2017**

ROSMERTA HSRP VENTURES PVT LTD Petitioner

Through: Mr Paras Kuhad, Senior Advocate
with Mr Manu Agarwal, Mr Jitin
Chaturvedi, Ms Aditi Tripathi, Ms
Devika Mohan and Ms Niyati Kohli,
Advocates.

versus

GOVT OF NCT OF DELHI AND ANR Respondents

Through: Mr Ramesh Singh, Standing counsel,
GNCTD and Mr Rahul Rajput,
Advocate.

CORAM:
HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER
% **24.07.2017**

VIBHU BAKHRU, J

CM Nos. 25835/2017 & 25836/2017

1. Allowed, subject to all just exceptions.
2. The application stands disposed of.

W.P.(C) 6217/2017& CM No.25834/2017

3. The petitioner (hereafter 'Rosmerta') has filed the present petition, *inter alia*, impugning a communication dated 19.07.2017 (hereafter 'the impugned communication') issued by the Deputy Commissioner (Operations) Transport Department of Govt. of NCT of Delhi directing the Rosmerta to appear before the Chief Secretary, Govt. of NCT of Delhi for consideration of Rosmerta's representation against the order dated

04.11.2016 passed by the Secretary and Commissioner (Transport), Govt. of NCT of Delhi.

4. In terms of the order dated 07.10.2016 passed by a Coordinate Bench of this Court in Arb. A. (Comm.) 33/2016 captioned as “*Government of NCT of Delhi v. Rosmerta Hsrp Ventures Pvt. Ltd.*”, Rosmerta’s representation was to be heard by “*an authority higher to the one who took the decision on the cure notice*”. It is the case of Rosmerta that the Hon’ble Lt. Governor of Delhi (respondent no.2) would be the next higher authority to the Secretary and Commissioner (Transport) who has passed the initial order, against which representation has been preferred by Rosmerta, and not the Chief Secretary, GNCTD.

5. Thus, the scope of present petition is, essentially, limited to the interpretation of the aforementioned order dated 07.10.2016.

6. Before proceeding further, it would be relevant to briefly indicate the background in which the present controversy arises.

7. The Government of India introduced a scheme of High Security Registration Plates (HSRP). The Department of Transport, GNCTD invited bids in March 2012 for "Selection of Supplier for High Security Registration Plates Project in the National Capital Territory of Delhi" (hereafter ‘the HSRP project’). Through a process of competitive bidding, the contract for implementation of the HSRP project was awarded to Rosmerta, which is a joint venture between M/s Rosmerta Technologies Ltd. (holding 74% equity) and M/s Utsav Safety Systems (P.) Ltd. (holding 26% equity).

8. On 25.04.2012, GNCTD entered into a Concession Agreement ('CA' in short) with Rosmerta for a term of 15 years for execution of the HSRP project. In terms of the CA, Rosmerta was authorised to finance, manufacture, distribute, affix HSRP and maintain the HSRP project and also enjoy the rights and benefits as specified in the CA. It is GNCTD's case that it received several complaints regarding violations and irregularities committed by Rosmerta in execution of the HSRP Project. GNCTD claims that a committee of officers was constituted to conduct an inquiry and based on the report of the said committee, it issued a show cause notice (SCN) dated 10.03.2014 to Rosmerta under Article 10 of the CA. Rosmerta filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the A&C Act'), which was disposed by this Court of on 26.03.2014 in view of the SCN issued by GNCTD.

9. In view of the disputes, Rosmerta invoked the arbitration clause as contained in the CA and an arbitral tribunal comprising of Justice (Retired) Aftab Alam, Justice (Retired) Usha Mehra and Justice (Retired) R.C. Lahoti (presiding), was constituted.

10. After the arbitral tribunal (in short 'AT') was constituted, Rosmerta filed an application under Section 17 of the A&C Act *inter alia* praying for an order restraining GNCTD from terminating the CA during the pendency of the arbitral proceedings. Rosmerta sought a further order from the AT directing GNCTD to continue performing its obligations under the CA and permit Rosmerta to continue performing its obligations under the CA. Rosmerta also sought an order to restrain GNCTD from inviting fresh tenders or from taking any coercive steps against Rosmerta in relation to the

CA.

11. The AT considered Article 10 and observed as under:-

"(7) It is not disputed by the Respondent that this clause contemplates a three-stage process of termination. Before the CA may be terminated for the default of the Concessionaire and the consequences flowing from the termination may follow, the Authority has to take three steps:

- (i) Issue a *Cure Notice* to the Concessionaire calling it upon to cure the default within the period as specified in the CA, or, within sixty days, if no period is specified;
- (ii) If the default is not cured then issue a notice to the Concessionaire indicating its intention to issue termination notice, i.e. a *pre-termination notice* giving fifteen days time to the Concessionaire to make representation against;
- (iii) Issue *Termination Notice*, which will have the effect of terminating the CA."

12. The AT further observed that the SCN had rolled up two steps of the termination process under the CA into one; inasmuch as, the SCN indicated GNCTD's intention to terminate the CA and at the same time also gave Rosmerta 60 days cure period as contemplated under Article 10 of the CA.

13. After considering the rival contentions, the AT issued directions for interim measures. The operative part of the order is set out below:-

"(12) On the facts and in the circumstances of the present matter, having considered the respective contentions advanced by the Ld. Sr. Counsels for the two sides and in view of the fact that the main matter itself is being set down

for final hearing, we direct the following interim arrangement to be made and remain in operation during the pendency of these arbitral proceedings:

- (i) The Authority shall appoint a date of hearing by giving a previous intimation of not less than a week and afford the Claimant an opportunity of being heard on the SCN and its reply.
- (ii) The Authority shall, thereafter, pass an order giving reasons in brief in support of the findings arrived at by it. A copy of the order shall be made available to the Claimant and also, placed on the record of the Tribunal.
- (iii) Any further step based on the decision arrived by the Authority shall be taken against the Claimant only with the leave of the Tribunal."

14. GNCTD being aggrieved by the direction that further steps could be taken only with the leave of the AT, filed an appeal under Section 37 of the A&C Act before this Court (being Arb. A. (Comm.) 33 of 2016). The said appeal was disposed of by this Court by an order dated 07.10.2016. This Court was of the view that AT had accepted GNCTD's plea that SCN was in effect a cure notice under Clause 10.1 of the CA and had, therefore, directed further logical steps to be taken in accordance with Article 10 of the CA.

15. After hearing the parties, this Court set aside the AT's direction that further steps would be taken by GNCTD only with the leave of AT. Consequently, the Court directed that hearing on the SCN be concluded within a period of 15 days from the order and further directed the Authority to pass a reasoned order within a period of four weeks and communicate the decision to Rosmerta. There was some controversy with regard to as to who would provide the hearing to Rosmerta, in this regard this Court accepted

that in terms of the CA, the Authority would be the Principal Secretary and Commissioner (Transport) Department, GNCTD and, unless there was a prior order of delegation, the said authority would hear Rosmerta on the SCN. This Court further directed that the representation against the decision on SCN would be considered by an authority higher to the one who takes the decision in respect of the SCN (which was considered as a cure notice). The relevant extract of the order dated 07.10.2016 is reproduced below:-

"28. The Court further directs that the hearing on the cure notice should be concluded within a period of 15 days from today with the full cooperation of both the Appellant and the Respondent with either side not being permitted to take unnecessary adjournments. The Authority will proceed to pass a reasoned order on the cure notice not later than four weeks from today and communicate such decision to the Respondent not later than one week thereafter. If such decision is adverse to the Respondent, then within 15 days after receiving a copy of the decision the Respondent will make its representation. Within two weeks of the receipt of such representation, an authority higher to the one who took the decision on the cure notice will consider such representation and if it considers necessary give a hearing to the Respondent. Thereafter an appropriate order will be passed on such representation within a further period of 15 days. The right of the Respondent to challenge the order passed on the cure notice as well as the order passed on the representation in accordance with law is reserved."

16. In terms of the aforesaid order, the Principal Secretary and Commissioner (Transport) passed an order dated 04.11.2016 after hearing Rosmerta.

17. Aggrieved by the same, Rosmerta filed a representation before Lt. Governor of Delhi under cover of its letter dated 21.11.2016. The Hon'ble

Lt. Governor referred the matter to be examined as per rules. Thereafter Rosmerta received the impugned communication informing Rosmerta that Chief Secretary, Delhi had decided to give an opportunity of hearing on 25.07.2017 and this has led Rosmerta to file the present petition.

18. As noticed hereinbefore, it is apparent that the controversy sought to be raised by the Rosmerta relates to the interpretation of the order dated 07.10.2016 passed by the Single Judge of this Court. Further, the representation contemplated is not under any statute but in terms of the CA - *albeit*, with a slight variation - and in terms of the aforementioned order dated 07.10.2016.

19. In these circumstances, Mr Paras Kuhad, learned Senior Counsel appearing for the Rosmerta was pointedly asked as to how the present petition would be maintainable and why the obvious option to seek a clarification, if any was required, was not preferred by Rosmerta. In response, he submitted that since the matter relates to implementation of an order passed by this Court, a writ petition under Article 226 of the Constitution of India would be maintainable and would be a preferred route as opposed to filing a contempt petition. He relied upon the decision in ***State of Haryana & Ors. v. M.P. Mohla: (2007) 1 SCC 457*** in support of his contention.

20. Mr Kuhad contended that in terms of Section 52 of the Government of National Capital Territory of Delhi Act, 1991, all contracts in connection with administration of the Capital were contracts made in exercise of the executive power of the Union and since the Lt. Governor was a delegate of the President, the next higher authority to Principal Secretary and

Commissioner (Transport), GNCTD would be the Lt. Governor and not the Chief Secretary, GNCTD. Next, he referred to the Transaction of Business of Government of National Capital Territory of Delhi Rules, 1993 and submitted that in terms of said rules, all proposals would be disposed of by or under authority of the Minister in charge and, therefore, the Chief Secretary, GNCTD and Commissioner (Transport), GNCTD who function under the Minister, would be the same authority. He further submitted that the affidavits filed by Rosmerta in Arb. A (Comm) 33/2016 also indicated that Lt. Governor, Delhi was the next higher authority and the same was not controverted. Lastly, he submitted that for hearing to be meaningful, it would be necessary that the representation not be heard by any officer of the GNCTD but by the Hon'ble Lt. Governor, Delhi.

21. As noticed above, the present disputes are contractual disputes that stem from the CA entered into between GNCTD and Rosmerta. The disputes relate to Article 10 of the CA relating to termination of the CA. The relevant extract of Article 10 of the CA is set out below:-

“10.1 Termination for Concessionaire Default

10.1.1 Save as otherwise provided in this Agreement, in the event that any of the defaults specified below shall have occurred, and the Concessionaire fails to cure the default within the Cure Period set forth below, or where no Cure Period is specified, then within a Cure Period of 60 (Sixty) days, the Concessionaire shall be deemed to be in default of this Agreement (a “Concessionaire Default”), unless the default has occurred solely as a result of any breach of this Agreement by the Authority or due to Force Majeure: The defaults referred to herein shall include:

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10.1.2 Without prejudice to any other rights or remedies which the Authority may have this Agreement, upon occurrence of a Concessionaire Default, the Authority shall be entitled to terminate this Agreement by issuing a Termination Notice to the Concessionaire; provided that before issuing the Termination Notice, the Authority shall be a notice inform the Concessionaire, of its intention to issue such Termination Notice and grant 15 (fifteen) days to the Concessionaire to make a representation, and may after the expiry of such 15 (fifteen) day, whether or not it is in receipt of such representation, issue the Termination Notice, subject to the provisions of Clause 10.1.3.”

22. As is apparent from the above and as noticed by the AT in its order dated 21.05.2016 as well as by this Court in its order dated 07.10.2016 in Arb. A. (Comm.) 33/2016, there is no dispute that the termination clause (Article 10 of the CA) provides a three-step procedure; first, is the cure notice to be issued to the Concessionaire calling upon it to cure the default; second, if the default is not cured within the cure notice period, a notice of intention to terminate, granting 15 days time to the Concessionaire to make a representation, is issued; and third step is to issue the termination notice. This is subject to Clause 10.1.3, which relates to providing the Senior Lenders a copy of the notice of intention to issue a termination notice as referred to in Clause 10.1.2 and proceedings thereto.

23. Clause 15.1 of the CA defines "Authority" as under:-

"15.1 Definitions

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"Authority" shall mean and include an officer of the Commissioner of Transport as designated by the GNCTD or any other agency of GNCTD so notified by the GNCTD for this purpose".

24. It is apparent from a plain reading of Clause 10.1.2 read with Clause 15.1 that the representation under the CA was to be considered by the Authority, which would be the Commissioner of Transport, GNCTD. However, this Court had in its order dated 07.10.2016 in Arb. A. (Comm.) 33/2016 specifically directed that such representation would be heard by an authority higher than the one who takes the decision on the SCN.

25. GNCTD has examined the question as to who would be an authority higher than the Principal Secretary and Commissioner (Transport), GNCTD and after examining the same, it has concluded that the Chief Secretary would be the next higher authority. The Lt. Governor, Delhi has also considered the said issue and passed the necessary orders on the file, which were produced by the respondents. The relevant extract of the order dated 17.03.2017 passed by the Lt. Governor, Delhi in this regard (as reflected in the files provided in Court) is set out below:-

“504. In the absence of any specific clause in the Agreement, I agree with the views of the Transport Department that Chief Secretary being the next higher authority, should decide the representation as per law/rules in terms of orders of Hon'ble High Court. This is also supported by the fact that Chief Secretary is the reporting authority of Commissioner (Transport) and this file also has been put up through him.”

26. This Court also concurs with the aforesaid view. Rule 6 of the Transaction of Business of Government of National Capital Territory of

Delhi Rules, 1993 also clearly provides that the Chief Secretary would be the Secretary to the Council of Ministers and Principal Secretary, General Administration Department will be the Joint Secretary to the Council. Indisputably, the Chief Secretary is a higher authority in the hierarchy of the cadre of the Civil Services. The contention that Lt. Governor, Delhi was contemplated as the next higher authority in the order dated 07.10.2016 is unpersuasive. There is no such direction that the representation is required to be heard by the Lt. Governor.

27. This Court is also of the, *prima facie*, view that the present petition lacks bonafides; any clarification as to the order passed by this Court on 07.10.2016 ought to have been obtained by filing a application in the disposed of appeal [Arb.A.(Comm) 33 of 2016]. However, it appears that the endeavour of Rosmerta was to avoid approaching the concerned bench by way of a clarification and it does appear that this is a case of forum hunting.

28. Plainly, the gravamen of the present petition is to seek a further clarification regarding the order dated 07.10.2016 and a petition under Article 226 of the Constitution of India for the same would be inapposite. The reliance placed on the decision of the Supreme Court in ***M.P. Mohla*** (*supra*) is also misplaced as in the given facts, no fresh cause of action has arisen so as to warrant a substantive petition.

29. It is also relevant to bear in mind that the disputes between Rosmerta and GNCTD are the subject matter of arbitration and the order passed by this Court directing that representation be heard by a higher authority has

been passed in an appeal preferred under Section 37 of the A&C Act. The disputes between the parties are contractual disputes and not in the realm of public law. In terms of Section 5 of the A&C Act, the scope of interference by judicial authorities is limited to as specifically provided for in the A&C Act. It is also well settled that a petition under Article 226 of the Constitution of India is not maintainable against any order of the arbitrator (see: *S.B.P. & Co. v. Patel Engineering Ltd. & Anr.*: (2005) 8 SCC 618). The order dated 07.10.2016 passed by a Single Judge of this Court in Arb A. (Comm.) 33/2016 was in appeal from the order passed by the AT under Section 17 of the A&C Act and thus was in continuation of the arbitral proceedings. By filing the present petition, Rosmerta seeks to indirectly secure intervention of this Court in respect of such disputes, which is otherwise impermissible. There is little scope of recourse to public law remedies in matters of arbitration. The subject matter of disputes being contractual and subject to arbitration, all facets of disputes, are outside the scope of interference by courts. For this reason too, the decision in *M.P. Mohla* (*supra*) would be of little assistance to Rosmerta.

30. Thus, if Rosmerta felt that there was any ambiguity with regard to the directions passed by this Court in Arb A. (Comm.) 33/2016, it could have approached the concerned bench by filing an application for clarification. However, Rosmerta did not adopt such course.

31. For the reasons stated above, the petition and the pending application are dismissed with costs of ₹50,000/-. The cost shall be deposited with the Delhi High Court Legal Services Committee within a period of one week from today and the proof of the same would be furnished to the Registry. In

the event, such proof is not furnished, the Registry is directed to place this matter before this Court.

VIBHU BAKHRU, J

JULY 24, 2017

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