

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

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Date of decision: 29th March, 2016

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W.P.(C) 3412/2013

ROSHAN LAL VOHRA & SONS & ANR. Petitioners

Through: Mr. Shyam Moorjani, Adv.

Versus

EAST MUNICIPAL CORPORATION OF DELHI Respondent

Through: Mr. Balendu Shekhar & Ms. Somya Rathore, Advs. with Mr. Zavvar Kazim, Asst. Engineer, EDMC.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. The petition (i) impugns the Circular dated 6th February, 2013 of the respondent East Delhi Municipal Corporation (EDMC) notifying all concerned of Rs.6.63 lacs being due from the petitioner and calling upon all concerned to recover the said amount from the payments if any due to the petitioner; and, (ii) seeks a mandamus to the respondent EDMC to make payment of Rs.6.63 lacs which had been illegally deducted from the amounts due to the petitioner under the other running contracts/agreements, along with interest at 18% per annum.

2. The petition was entertained and pleadings have been completed On 9th July, 2015, when the matter came up for hearing, attention of the counsel for

the petitioners was invited to *Godavari Sugar Mills Ltd. Vs. State of Maharashtra* (2011) 2 SCC 439 holding that money recovery in writ jurisdiction can be done only when accompanied with a challenge to *vires* of a tax or statute under which recovery has been effected and which was not the position here. On the request of the counsel for the petitioners hearing was adjourned. During the course of further hearing on 14th July, 2015 the counsel for the respondent EDMC also handed over copy of the General Conditions of Contract of MCD and drew attention to Clause 29A thereof. It was the contention of the counsel for the petitioners that the respondent EDMC having not referred thereto in the counter affidavit, could not during the hearing rely thereon. Keeping open the said objection, judgment was reserved.

3. It is the case of the petitioners (i) that petitioner no.1 of which petitioner no.2 Sh. Anil Vohra is sole proprietor is enlisted as a Class-I contractor with the Municipal Corporation of Delhi (MCD) for the last many years; (ii) upon bifurcation of the MCD, the relevant project in respect whereof the disputes subject matter of petition had arisen fell within the jurisdiction of EDMC; (iii) that MCD/EDMC invited tender bids in respect to certain works pertaining to construction of 120 bedded ward block at Swami Dayanand Hospital, Shahdara (North) vide Work Order dated 17th April, 2006; (iv) vide another

Work Order also dated 17th April, 2006 bids were invited in respect of construction of additional floors of OPD Block at the same hospital; (v) that the petitioners were chosen for carrying out both Work Orders and the terms and conditions of engagement were reduced into writing; (vi) that the petitioners carried out the work subject matter of both Work Orders to the satisfaction of the respondent EDMC and certificates in that regard were issued; (vii) that even after completion of the works, no complaints were made or deficiencies reported; (viii) that after three years of the completion of the works, vide letter dated 26th September, 2012 a sum of Rs.6,63,267/- was demanded from the petitioners on the ground of the petitioners having used less cement than the quantity specified for execution of the aforesaid work and the said fact having come to light during the course of an audit; (ix) the petitioners immediately responded contending that the demand after more than three years of execution of the work was arbitrary and without jurisdiction; (x) however the respondent EDMC issued the impugned Circular dated 6th February, 2013 and in pursuance whereof the said amount was deducted out of the payments due to the petitioners in respect of another Work Order; and, (xi) that no opportunity of hearing was given to the petitioners

before making the said recovery and that the said recovery had been made without following the procedure prescribed by law.

4. The respondent EDMC has contested the petition pleading (i) that writ remedy is not maintainable; (ii) that as per the contract between the parties the petitioners were bound to accept the decision of the audit party and the Audit Department has found that the design mix was designed at a lesser quantity of cement than stipulated; (iii) that recoveries on the basis of audit reports is a settled principle – instances of such recoveries are given in the Annexure R-1 to the counter affidavit; (iv) that the deduction was made after demanding the amount from the petitioners and upon the failure of the petitioners to pay the same and in accordance with clause 29(ii) of the Agreement; and, (v) that the Audit Department of the respondent EDMC carries out assessment to re-check and re-asses the entire transaction based on available records and the petitioners are duty bound to accept their finding.

5. The petitioners have filed a rejoinder wherein with respect to the contract referred to in the counter affidavit it is stated that the contents thereof are matter of record but there is no provision in the contract which entitles the respondents to recover any amount from the petitioners without following the due process of law.

6. The counsel for the petitioners in response to the query made from him with reference to *Godavari Sugar Mills Ltd.* supra contended that the petitioners are not seeking enforcement of a money claim under a Contract but are seeking declaration of the monies recovered by the respondent EDMC without following the due process of law as illegal. Reliance in this regard was placed on *Piramal Healthcare Limited Vs. Union of India* 202 (2013) DLT 15. It was further argued that (a) no show cause notice was issued to the petitioners with respect to the alleged audit; (b) that the claim of the monies recovered illegally was barred by time; (c) that without any legal determination of any liability owed by the petitioners to the respondent EDMC, no recoveries could have been made; (d) that the respondent EDMC is not entitled to make any such deductions. Attention was invited to the certificates dated 10th July, 2009 with respect to the Work Order dated 17th April, 2006 certifying that the work had been completed without levy of compensation and was of good quality. It was argued that the respondent EDMC cannot become a Judge in its own cause and reliance in this regard was placed on *M/s. Macadum Makers Vs. State of Chhattisgarh* AIR 2012 Chh 123 and on *State of Karnataka Vs. Shree Rameshwara Rice Mills, Thirthahalli* AIR 1987 SC 1359.

7. Per contra the counsel for the respondent EDMC referred to my judgment speaking for the Division Bench of this Court in *Chakradar Auto Udyog Pvt. Ltd. Vs. Engineering Export Promotion Council* MANU/DE/4248/2012 and to *Cicily Kallarackal Vs. Vehicle Factory* (2012) 8 SCC 524.

8. The counsel for the petitioners with reference to Clause 29A invoked by the counsel for the respondent EDMC argued that the same cannot be invoked after conclusion of the contract and that the same also does not authorize self adjudication.

9. I have considered the rival contentions.

10. I will first deal with the objection of the counsel for the petitioners to the reliance by the counsel for the respondent EDMC during the hearing on a clause of the contract. In this regard I may state that the petitioners, along with the petition, did not choose to place the terms of the tender in response to which the petitioners had submitted the bids resulting in the Work Orders or the Work Orders or the Agreements which the petitioners in the petition itself admitted was executed. The respondent EDMC in its counter affidavit specifically referred to the contract and claimed its action to be in accordance with the contract and relied at least on Clause 29(ii) of the contract. In my

opinion in a *lis* emanating from a contract and when the petitioner who approaches the Court fails to place the contract before the Court, notwithstanding the failure of the respondent EDMC also to place the contract along with its counter affidavit, this Court is not precluded from looking into the contract at the stage of final hearing, especially when there is no dispute as to the contents thereof.

11. Clause 29(ii) as quoted by the respondent EDMC in the counter affidavit and Clause 29A invoked during the hearing are as under:-

“.... Government shall have the right to cause an audit and technical examination of the works and the final bills of the contractor including all supporting vouchers, abstract, etc., to be made after payment of the final bill and if as a result of such audit and technical examination any sum is found to have been overpaid in respect of any work done by the contractor under the contract or any work claimed to have been done by him under the contract and found not to have been executed, the contractor shall be liable to refund the amount of over-payment and it shall be lawful for Government to recover the same from him in the manner prescribed in sub-clause (i) of this clause or in any other manner legally permissible; and if it is found that the contractor was paid less than what was due to him under the contract in respect of any work executed by him under it, the amount of such under payment shall be duly paid by Government to the contractor, without any interest thereon whatsoever....”

“ CLAUSE 29 A

Lien in respect of claims in other contracts

Any sum of money due and payable to the contractor (including the security deposit returnable to him) under the contract may be withheld or retained by way of lien by the Engineer-in-Charge or the M.C.D. or any other contracting person or person through Engineer-in-Charge against any claim of the Engineer-in-Charge or M.C.D. or such other person or persons in respect of payment of a sum of money arising out of or under any other contract by made the contractor with the Engineer-in-Charge or the M.C.D. or with such other person or persons.

It is an agreed term of the contract that the sum of money so withheld or retained under this clause by the Engineer-in-Charge or the M.C.D. will be kept withheld or retained as such by the Engineer-in-Charge or the M.C.D. or till his claim arising out of the same contract or any other contract is either mutually settled or determined by the arbitration clause or by the competent court, as the case may be and that the contract shall have not claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this clause and duly notified as such to the contractor.”

12. The question in controversy is twofold. Firstly, the entitlement of the EDMC as State to determine the amount claimed by it to have been received by the petitioners in excess than due under the contract and secondly, the maintainability of a writ petition challenging such an action of the EDMC as State and seeking recovery of the amounts so deducted.

13. Supreme Court in ***Shree Rameshwara Rice Mills, Thirthahalli*** supra relied upon by the counsel for the petitioners was concerned with the

correctness of the opinion rendered by a Full Bench of the High Court of Karnataka in a reference made in a Regular Second Appeal arising from a suit and in accordance with which opinion certain writ petitions had also been allowed. The Full Bench had held that where an Agreement between the State and a private person provides that for any breach of the conditions such persons shall be liable to pay damages as may be assessed by the State and such damages shall be recovered as arrears of land revenue, the State is not competent to adjudicate upon the question whether such a person committed breach of contract and that the State is not competent to assess damages for any breach of the contract which is not admitted by the other side and the damages so assessed cannot be recovered as arrears of land revenue. Before the Supreme Court, the contention of the State was that the terms of the Agreement were wide and comprehensive enough to hold that the officer named, representing the State, had competence and sanction to decide whether any breach of conditions of contract had been committed and also to determine the quantum of damages payable for the breach. The said contention was rejected on an interpretation of the clause subject matter of Agreement in that case as meaning that the right of the State to assess damages would arise only if the breach of conditions is admitted or if no issue

is made of it. It was further held that if it was the intention of the parties that the officer acting on behalf of the State was also entitled to adjudicate upon a dispute regarding the breach of conditions, the wordings would have been entirely different. It was yet further held that a right to adjudicate upon an issue relating to breach of conditions of the contract does not flow from and is not inhered in the right conferred to assess damages arising from a breach of conditions; the power to assess damages is a subsidiary and consequential power and not the primary power. It was yet further reasoned that a party to the Agreement cannot be an arbiter in his own cause. The Supreme Court however held that damages becoming payable on account of breach of conditions of the Agreement constitute amounts payable under the contract.

14. It would thus be seen that the ratio of the judgment supra relied upon by the counsel for the petitioners, on an interpretation of the contract subject matter of that case, is that though State as a party to the Agreement was not competent to determine whether the party with which it had contracted has committed a breach of the Agreement or not but once the breach is admitted / established, State is entitled to assess the damages and recovery of such damages would be recovery of an amount due under the Contract.

15. The Division Bench of the High Court of Chhattisgarh in *M/s. Macadam Makers* supra was concerned with a writ petition impugning an order of the Executive Engineer informing all the Executive Engineers not to make any payment or refund any amount due to the contractor therein because of a recovery due from the contractor therein under a contract qua which a certificate of completion had been issued to the contractor. High Court, relying on *ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553, *Karnataka State Forest Industries Corporation Vs. Indian Rocks* (2009) 1 SCC 150 and *Kisan Sahkari Chini Mills Ltd. Vs. Vardan Linkers* (2008) 12 SCC 500, held the writ petition to be maintainable and further reasoning that since security deposit had already been refunded to the contractor and the claim of the State which was sought to be recovered in the manner impugned was disputed and since Supreme Court in *Shree Rameshwara Rice Mills, Thirthahalli* supra has held that the State cannot be the judge in its own cause, allowed the writ petition with liberty to the State to invoke arbitration agreed upon for recovery of its dues.

16. In *Piramal Healthcare Limited* supra, a Single Judge of this Court was concerned with the challenge in a writ petition to the rejection of a claim for refund of advance license fee paid and for a direction for refund thereof. The

learned Single Judge has prefaced the judgment observing that “there is admittedly no clause in the advertisement issued by the respondents, inviting Expression of Interest (in short EOI) or, in the tender conditions, empowering the respondents to retain and / or forfeit the license fee.” The objection to the maintainability of the writ petition was negated relying on **ABL International Ltd.** supra and after noticing **Godavari Sugar Mills Ltd.** supra and holding “that the Supreme Court has undoubtedly veered from a conservative position that a writ petition would not lie for entertaining disputes which emanate from a breach of contract to now conclude or let me say explain that this is not an absolute rule and much would depend on the facts and circumstances of each case” allowed the writ petition by directing refund of advance licence fee to the petitioner.

17. As far as the judgments relied upon by the counsel for the respondent EDMC are concerned, in **Chakradar Auto Udyog Pvt. Ltd.** supra, the Division Bench of this Court relying on **Godavari Sugar Mills Ltd.** supra held that a writ petition for enforcing a monetary claim is not maintainable and **Cicily Kallarackal** supra is not found to be relevant to the issue.

18. Supreme Court since **ABL International Ltd.** supra and **Godavari Sugar Mills Ltd.** supra has again dealt with the issue of maintainability of a

writ petition in contractual matters in ***Joshi Technologies International Inc. Vs. Union of India*** (2015) 7 SCC 728 and in order dated 18th March, 20015 in Civil Appeal No.3053/2015 arising out of SLP (C) No.15689/20011 titled ***National Highways Authority of India Vs. MEIL- EDB LLC (JV)*** and both of which have been extensively dealt by me in ***CCPL Developers Pvt. Ltd. Vs. Gail (India) Ltd.*** MANU/DE/4361/2015 by extracting the relevant portions thereof and I thus do not feel the need to burden this judgment with the lengthy discussion as contained therein. It is also worth mentioning that ***MEIL- EDB LLC (JV)*** supra was against the judgment dated 10th March, 2011 of a Division Bench of this Court in W.P.(C) No.8418/2010 titled ***M/s. Madhucon Projects Ltd. Vs. National Highways Authority of India***. Relying on the said two judgments, I held that a final decision with respect to contractual rights of the parties is not permissible in writ jurisdiction.

19. I may in this regard mention that the claim of the petitioners in the present petition, shorn of its challenges, is a monetary claim under a contract. What the petitioners claim is that the monies due to them under the contract entered into with the respondent EDMC are being not paid. To the said monetary claim is added the challenge to the reason given by the respondent EDMC for not making the payment. I have wondered if a writ petition under

Article 226 of the Constitution of India would have been maintainable on the respondent EDMC simply withholding the monies without disclosing any reason which according to the petitioners were due under the contract. In my opinion, for the detailed reasons given by me in **CCPL Developers Pvt. Ltd.** supra, it would not have been. If it would not have been, merely because the respondent EDMC has given reasons for withholding the money, the writ petition would not become maintainable.

20. Otherwise also, each of the judgments aforesaid relied upon by the counsel for the petitioners has turned on its own facts and on an interpretation of contract subject matter thereof. As already noticed above, in **Piramal Healthcare Limited** supra, there was no clause entitling the Union of India (UOI) in that case to forfeit or retain the advance license fee. However in the contract in the present case, the action of the respondent EDMC is in accordance with Clause 29(ii) quoted in the counter affidavit of the respondent EDMC. Though the counsel for the petitioners has not argued but I may mention that the respondent EDMC in its counter affidavit appears to have set out the clause in the government contracts and not the clause in its own contracts and in which the words 'Engineer Incharge' or the 'MCD' appear instead of the word 'government'. In accordance with the said Clause,

the respondent EDMC has/had a right to cause an audit and technical examination of the works after the payment of a final bill and if in such audit any amount was found to have been overpaid to the contractor, to recover the same from the contractor by withholding the payments from other accounts. Such a Clause is materially different from the Clause which was subject matter of *Shree Rameshwara Rice Mills, Thirthahalli* supra and *M/s. Macadum Makers* supra. Here, the respondent EDMC is not seeking to be a judge in its own cause as was the case therein but is seeking to recover monies if any found to have been overpaid as a result of audit. Generally such audit is by external agencies. Moreover, spending of all public monies as the monies of EDMC, are subject to such audit. State and State instrumentalities, as the respondent EDMC work through officers and actions of such officers especially entailing monetary consequences have been made subject to audit as they otherwise also would be. Such arrangement, by no stretch of imagination, can be said to be bad under the law. Moreover, in the petition, there is no challenge thereto.

21. Though the petitioners, in this petition, besides seeking recovery of money are also impugning the Circular dated 6th February, 2013 aforesaid of EDMC directing recovery of claimed amounts from monies payable to

petitioners under other contracts and on first blush it may appear that this Court in writ jurisdiction can certainly grant the said relief on the principles enshrined in *Shree Rameshwara Rice Mills, Thirthahalli* supra and *M/s. Macadum Makers* supra but on deeper consideration it is found that the relief of striking down the said circular i.e. prohibiting EDMC from acting thereunder is also in substance and reality a direction to pay what has been directed to be withheld thereunder.

22. Supreme court in *H.M. Kamaluddin Ansari and Co. vs. Union of India* (1983) 4 SCC 417 after noticing the trend of the judgements of this court emanating from *Mohan Meakin Breweries Limited vs. Union of India* AIR 1975 Delhi 248 and which in turn relied on *Union of India vs. Raman Iron Foundry* (1974) 2 SCC 231 of injuncting the state and state agencies from withholding the amounts due to the contractors under pending bills in other contracts held that such an order necessarily means that the amount must be paid. It was held that such an order in substance amounts to a direction to pay the amounts due under other contracts. The Supreme Court also noticed that Directorate General of Supplies and Disposals (DGS&D), General Conditions of Contract whereof were subject matter of interpretation in *Raman Iron Foundry* supra had since amended its contract and under the amended

contract it was entitled to withhold not only the monies which were due to it from the contractors, but also the monies for which it merely had a claim against the contractors. The Supreme Court held that once the contract conferred power to withhold the amount for which there was only a claim, no injunction restraining the state or its agencies from withholding the amount could be issued.

23. Again in *M/s Sant Ram & Company Vs. State of Rajasthan* (1997) 1 SCC 147 it was held that no injunction restraining withholding the amount due under other pending bills of the contractor and which injunction virtually amounted to a direction to pay the amount, could be granted.

24. The fallacy of the argument of the counsel for the petitioners is that, citing judgments ratio whereof is that the government / governmental agency cannot be a judge in its own cause for claim for breach of contract and which judgments may be of assistance to him in a claim in a suit or in an arbitration proceedings for recovery of monies withheld, he is seeking to restrain the respondent EDMC from withholding the monies due to the petitioners under other contracts and which injunction cannot be granted as per the judgments of the Supreme Court in *H.M. Kamaluddin Ansari and Co.* supra and *M/s Sant Ram & Company* supra.

25. The writ petition is not maintainable not only because it is in enforcement of a money claim under a contract but also because the direction for recovery of money claims from dues under other contracts being in accordance with contract, cannot be found fault with. The petition is thus dismissed. However the petitioners shall be entitled to take appropriate proceedings in law i.e. of a suit or of an arbitration for recovery of the monies if any due to them and since this Court had entertained the petition and the same remained pending in this Court, in computation of period of limitation for instituting such proceedings the time between the date on which this writ petition was filed and till today shall stand excluded.

No costs.

MARCH 29, 2016
'pp/gsr'

RAJIV SAHAI ENDLAW, J.