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

+ **W.P.(C) 5198/2015**

VINAY KUMAR SINGH Petitioner
Through: Mr. Manu Parashar with Mr. Rama
Krishna and Mr. Manoj Saxena, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ANR
..... Respondents
Through: Mr. Mukesh Kumar, Adv. for NHAI

CORAM:
HON'BLE MR. JUSTICE MANMOHAN

ORDER

% **18.05.2016**

The present writ petition has been filed seeking a direction to refund the petitioner's bid security amount of Rs. 17.33 lacs as well as for withdrawal of the banning order for two years.

Admittedly, the ban order has expired by efflux of time. Consequently, the second relief has become infructuous.

Learned counsel for the petitioner also fairly prays for only refund of the petitioner's bid security amount.

The Supreme Court in *Joshi Technologies International Inc.v. Union of India & Ors, IV (2015) SLT 711* has held as under:

"57. Law in this aspect has developed through catena of judgments of this Court and from the reading of these judgments it would follow that in pure contractual matters extraordinary remedy of writ under Article 226 or Article 32 of the Constitution cannot be invoked. However, in a limited sphere such remedies are available only when the non-

Government contracting party is able to demonstrate that it is a public law remedy which such party seeks to invoke, in contradistinction to the private law remedy simplicitor under the contract. Some of the case law to bring home this cardinal principle is taken note of hereinafter.

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68. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

- (a) The Court may not examine the issue unless the action has some public law character attached to it.
- (b) Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.
- (c) If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.
- (d) Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

69. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

- (i) At the stage of entering into a contract, the State acts

purely in its executive capacity and is bound by the obligations of fairness.

- (ii) State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.*
- (iii) Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases Court can direct the aggrieved party to resort to alternate remedy of civil suit etc.*
- (iv) Writ jurisdiction of the High Court under Article 226 was not intended to facilitate avoidance of obligation voluntarily incurred.*
- (v) Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so; and he can challenge the conditions under which he agreed to take the license, if he finds it commercially inexpedient to conduct his business.*
- (vi) Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.*
- (vii) Writ can be issued where there is executive action*

unsupported by law or even in respect of a corporation there is denial of equality before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

- (viii) *If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.*
- (ix) *The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. Dichotomy between public law and private law, rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law, field cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision making process or that the decision is not arbitrary.*
- (x) *Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due*

weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

- (xi) *The scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes.*”

(emphasis supplied)

Keeping in view the aforesaid principles, this Court is of the view that on the facts, it is not a fit case where it should exercise its discretionary jurisdiction under Article 226 of the Constitution. The matter is in the realm of pure contract. It is not a case where any statutory contract has been awarded. Consequently, the present writ petition is dismissed with liberty to the petitioner to file alternate legal proceedings.

MANMOHAN, J

MAY 18, 2016
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