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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P.(I) (COMM.) 190/2018 & IA No.5634/2018**

SOBHA APPLIED DSP PRIVATE LIMITED..... Petitioner

Through: Mr Neeraj Malhotra, Senior
Advocate with Mr Vaibhav Mishra,
Advocate.

versus

GOVERNMENT OF NCT OF DELHI & ORS..... Respondents

Through: Mr Ramesh Singh, Standing
Counsel GNCTD with Mr Chirayu Jain,
Advocate.

Mrs Avnish Ahlawat, Advocate along with
Mr N.K. Singh, Advocate for DTC.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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25.04.2018

VIBHU BAKHRU, J

1. The petitioner has filed the present petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that the respondents be restrained from proceeding ahead with tender [RFP Document No. DTC/ITD/404/2018] floated for inviting bids to install 3775 GPS Devices in the buses under respondent no.3 (DTC).

2. Respondent no.2 (hereafter 'DIMTS') was issued a mandate of respondent no.1 (hereafter 'GNCTD') to implement the Automatic Vehicle Location System (AVLS) to track the movement of DTC Buses, Blue Line Buses and other vehicles. Pursuant to the said

mandate, DIMTS had issued a Request for Proposal (RFP) dated 18.09.2009. In terms of the RFP, proposals were invited from various parties for design, manufacture, supply, install, commission and maintenance of GPS Devices and associated services. In terms of the RFP, a consortium of which the petitioner was a lead member submitted their proposal. After discussions, the said proposal was accepted by DIMTS and it issued a Letter of Award (LOA) dated 29.10.2009.

3. Thereafter, the petitioner, GNCTD and DIMTS entered into a tripartite agreement dated 08.04.2010 (hereafter 'Support Agreement'). This was for the purpose of providing certain assurances, facilitation and support to the Automatic Vehicle Location System (AVLS) Project. DIMTS and the petitioner were required to enter into a Service Agreement and it was expressly provided that the term of the Support Agreement would be co-terminus with the Service Agreement.

4. On the same date – that is 08.04.2010 – DIMTS and the petitioner also entered into the Service Agreement, whereby the petitioner agreed to design, manufacture, supply, install and commission GPS Devices as per specifications.

5. The petitioner claims that in terms of the said Service Agreement, it has supplied GPS devices for buses and other vehicles including buses being operated by respondent no.3 (DTC). DTC has now issued a public tender inviting bids from other parties for supply of GPS devices. It is the case of the petitioner that the effect of awarding of the contract pursuant to the aforesaid tender would

effectively mean that the Service Agreement entered into by the petitioner with DIMTS would stand terminated.

6. Mr Malhotra, learned Senior Counsel appearing for the petitioner submitted that the term of the Service Agreement was for a period of 10 years commencing from 08.04.2010 till 02.03.2020 and period of approximately two years still remains. He submits that GNCTD and DIMTS have not terminated the aforesaid agreements (Support Agreement and Service Agreement) and are proceeding with the inviting of the fresh bids, which is patently illegal.

7. He referred to the decision of *Pioneer Publicity Corporation v. Delhi Transport Corporation & Anr: 103 (2003) DLT 442* and on the strength of the aforesaid decision submitted that since the respondents are State, within the meaning of Article 12 of the Constitution of India, they cannot act arbitrarily even in contractual matters. He further contended that notwithstanding that the Service Agreement and Support Agreement are determinable, an injunction could be issued restraining them from terminating the said agreements.

8. Mr Ramesh Singh, the learned counsel, who appears for GNCTD on advance notice has drawn the attention of this Court to the Support Agreement, which expressly indicates that GNCTD had appointed DIMTS as a system integrator for implementing the AVLS project and had entered into an agreement (referred to as 'AVLS Agreement') with DIMTS in this regard. He submits that the agreements entered into with the petitioner were pursuant to the aforesaid AVLS Agreement. He further submits that the AVLS Agreement was terminated with effect from 21.09.2017 and, therefore,

DIMTS is no longer engaged for providing any of the services. He submits that as the petitioner and DIMTS had entered into the Service Agreement pursuant to the aforesaid AVLS Agreement, the respondents cannot be bound to avail services from the petitioner once the ALVS Agreement was terminated. He further submits that DTC was not a party either to the Support Agreement or the Service Agreement and, therefore, cannot be interdicted from procuring GPS devices from other vendors.

9. I have heard the learned counsel for the petitioner as well as the GNCTD.

10. At the outset, it is relevant to note that admittedly the Service Agreement entered into between the petitioner and DIMTS is a determinable agreement. Article 3 of the Service Agreement provides for Contract Period and Clause 3.1 of the Service Agreement expressly provides that the Service Agreement would be valid till 02.03.2020 *unless terminated earlier*. The said clause is reproduced below:

“3.1 This Agreement shall come into effect on execution hereof and shall, unless terminated earlier or extended in accordance with the provisions hereof, shall be valid from the date of this Agreement till 2nd day of March, 2020 (“**Contract Period**”);

Provided that in the event of the Contract being extended by DIMTS beyond 2nd day of March, 2020 in accordance with the provisions hereof, the Contract Period shall include the period/aggregate period by which the Contract is so extended;

Provided further that in the event of Termination, the Contract Period shall mean and be limited to the period commencing from the Agreement Date and ending on the Termination Date.

The Contract may be renewed by DIMTS, at its sole and absolute on same terms and conditions as those that are provided herein or modified terms as mutually agreed.

11. Article 9 of the Service Agreement contains the mechanism for termination and consequences of such termination. Clause 9.2 of the Service Agreement provides for events of default on the part of DIMTS. The said clause is produced below:

“9.2 DIMTS’ Event of Default

The following event(s) shall constitute an event of default of DIMTS (a “DIMTS’ Event of Default”) unless such DIMTS’ Event of Default has occurred as a result of Vendor’s Event of Default or a Force Majeure Event:

- (a) DIMTS is in breach of this Agreement and such breach has a Material Adverse Effect on Vendor and DIMTS has failed to cure such breach or take effective steps for curing such breach within the Cure Period; or
- (b) DIMTS repudiates this Agreement or otherwise evidences an irrevocable intention not to be bound by this Agreement.”

12. As is apparent from the above, Clause 9.2(b) of the Service Agreement expressly provides that if DIMTS repudiates the Service

Agreement or indicates its intention not to be bound by it, the same would constitute DIMTS Event of Default. Clause 9.9(b)(ii) of the Service Agreement provides of the consequences of termination of the Service Agreement due to DIMTS' Event of Default. The said clause is set out below:

“9.9(b)(ii) **Due to DIMTS' Event of Default**

DIMTS shall purchase the GPS Devices:

- (1) Vendor not to remove the GPS Devices and the same together with associated records, documentation and data shall be transferred by Vendor to DIMTS; and
- (2) DIMTS to pay the Buy out Price of the GPS Devices to Vendor based on the timing when such termination occurs as provided for in Article 9.10.

13. Section 14(1) of the Specific Relief Act, 1963 expressly provides that the certain contracts are not specifically enforceable. In terms of Section 14(1)(c) of the said Act, a contract which is in its nature determinable, would not be enforced. In view of the above, it is difficult for this Court to grant a relief as sought for by the petitioner as the said relief is in indirect aid to specifically enforce the Service Agreement.

14. It is also important to note that there is no averment in the present petition which even remotely indicate that the compensation in money would not be an adequate relief. A plain reading of the petition indicates that the petitioner is aggrieved by withholding of the

payments which are claimed to be due to the petitioner. Plainly, the contract between the petitioner and DIMTS is a commercial contract for supply of GPS devices and in the event it is found that the Service Agreement has been wrongfully terminated then a monetary compensation would be an adequate remedy. There is also no material to indicate that if the relief sought by the petitioner is not granted, it would suffer an irreparable or any irretrievable injury. Thus, on first principles, the relief as sought for cannot be granted.

15. The reliance placed by the petitioner on the decision of the Coordinate Bench of this Court in *Pioneer Publicity Corporation (supra)* is misplaced. In that case, the Court had found that the provisions of Specific Relief Act, 1963 were not attracted as the contract between the parties prohibited grant of compensation. Undoubtedly, in the given cases, the Court may interdict any action of a State, even in contractual matters, where it is found that such action is arbitrary and unreasonable. There is no quarrel with the proposition that a State is enjoined to act fairly and all its actions can be tested on the anvil of the constitutional guarantees. However, it must also be borne in mind that a clear distinction must be maintained in matters relating to private law and public law. The petitioner is seeking to enforce a private law remedy and, therefore, the same must be considered in reference of the terms of the contract

16. In a contractual matter an agency of State enjoys greater freedom. In the present case, the Service Agreement envisages a situation where DIMTS by its conduct may repudiate the Service Agreement and further also provides the consequences thereof. In

such circumstances, granting of the relief as sought for by the petitioner would not be apposite.

17. There is also much merit in the contention that DTC has not entered into any agreement with the petitioner and, therefore, cannot be interdicted in carrying out its affairs.

18. Mr Malhotra had earnestly contended that DTC functions under GNCTD and, therefore, must be bound by the agreements in question. This Court is not persuaded to accept the aforesaid contention for several reasons. First of all, the principal agreement which the petitioner seeks to indirectly enforce by way of this petition is the Service Agreement, which has been entered into by the petitioner with DIMTS and, plainly, DTC cannot be held bound by the Service Agreement. Secondly, DIMTS had entered into the Service Agreement with the petitioner pursuant to the AVLS Agreement entered into between GNCTD and DIMTS. As stated by Mr Singh, the AVLS Agreement has been terminated by GNCTD. Thirdly, DTC is an independent incorporation and has full freedom to enter into contracts with the parties for carrying out its business in the manner in which it deems fit. It cannot be restrained on account of a contractual arrangement between third parties. Lastly, the Corporate Veil can be lifted in exceptional and rare cases such as where a corporate facade is used to perpetuate a fraud; however no such case has been established.

19. Mr Malhotra had also relied upon the decision of the Coordinate Bench of this Court in ***Goyal Mg Gases Ltd. and Anr. v. Griesheim GmbH: 75 (1998) DLT 737*** in support of his contention that the directions can be issued to third parties under Section 9 of the Act. In

that case, the allegation was that respondent no.1 (who was a party to the arbitration agreement) was transferring its shares to its holding company (respondent no.2) in violation of the agreement with the petitioner therein. It is in that context that respondent nos. 1 and 2 were restrained from entering into competition with the petitioner company. In the present case, the tender which is sought to be interdicted has been issued by DTC and not by DIMTS; therefore, it cannot be stated to be an action initiated by DIMTS in violation of the Service Agreement.

20. For the reasons stated above, this Court is not persuaded to accept that the interim relief as prayed for is warranted.

21. The petition is, accordingly, dismissed. The pending application is also disposed of.

22. It is clarified that this would not preclude the petitioner to agitate its grievances before an arbitral tribunal or any other forum.

23. Order *dasti* to both the parties.

VIBHU BAKHRU, J

APRIL 25, 2018

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