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

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Judgment delivered on: 23.12.2021

+ W.P.(C) 3061/2021& CM APPLS. 9263/2021, 28894/2021

M/S NEPTUNE INDIA LTD

..... Petitioner

versus

NEW DELHI MUNICIPAL COUNCIL

.....Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Sudhanshu Batra, Senior Advocate with Mr. Rishi Manchanda, Mr. Siddharth Kaushik, Mr. Siddharth Mullick and Ms. Bharti, Advocates.

For the Respondent: Ms. Kanika Agnihotri, Advocate.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Petitioner seeks a restraint on the respondent from terminating agreement dated 09.08.2017 for not furnishing the performance guarantee. Further petitioner seeks a restraint on the respondent from recovering the license fee for the month June-July, 2020 and a reduced license fee for the period August, 2020 to December, 2020 and to adjust the encashed performance guarantees against the outstanding amount payable.

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Signing Date: 24.12.2021 11:00:13
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to HMJ Sanjeev Sachdeva.

W.P(C) 3061/2021

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2. Petitioner had submitted a bid for being appointed as a concessionaire for design, development, implementation, operation and maintenance of smart parking solution for on street, off street and indoor parking spaces in NDMC area on Public Private Partnership model. On 10.07.2017 letter of acceptance of tender was issued to the petitioner. As per the petitioner there were certain shortages of equivalent car space allotted to the petitioner than what was tendered.

3. As per the terms of the agreement petitioner had to pay 61% of the gross revenue or Rs.75 lakhs per month whichever is higher which was liable to be increased periodically and accordingly on 01.07.2019 it became Rs.76,85,985/-.

4. Disputes have arisen between the parties. As per the respondent, petitioner has short paid the license fee and has been irregular in the payments of the monthly license fee.

5. The case of the petitioner is that during the period of lockdown some concession should have been granted to the petitioner in terms of the *Force majeure* clause of the contract.

6. Since the petitioner allegedly delayed the payments and further delayed performing his obligations under the contract, respondents invoked the performance guarantee. The invocation is disputed by the petitioner *inter alia* on the ground that they have counter claims.

7. It may be noticed that the contract has not been terminated till date and petitioner is still servicing the contract.

8. It is contended on behalf of the respondents, that though they are entitled to terminate the contract, as the contract has not yet been terminated, petitioner is liable to replenish the performance bank guarantees and continue to pay the regular license fee in accordance with the terms of the contract.

9. Learned counsel appearing for the respondent submits that since the present petition was pending and in deference to the Court they did not exercise the right to terminate the contract and have filed an application (CM APPL.32231/2021) seeking permission of the Court to exercise the right of termination.

10. On 08.03.2021, when the petition was listed before this Court for the first time, a statement was made on behalf of the petitioner that Petitioner shall, within a period of three months, replenish the performance bank guarantees in the sum of Rs.4.054 crores that had been invoked by the respondents and shall also continue to pay the regular license fee as per the contract.

11. On 31.08.2021 a submission was made by the counsel for the respondent that despite three months' time being granted to the petitioner and even till that date, the performance bank guarantees have not been replenished and the regular license fee was also not

paid.

12. Thereafter respondents filed the application (CM APPL.32231/2021) seeking leave of the Court to terminate the contract on account of petitioner's default in honoring the statement given to this Court on 08.03.2021.

13. On 10.11.2021, once again it was pointed out by learned counsel for the respondent that the statement given to this Court on 08.03.2021, that petitioner shall replenish the bank guarantees in the sum of Rs.4.054 crores and continue to pay the regular license fee, had still not been complied with.

14. On 10.11.2021, petitioner was given one last opportunity to comply with the statement before the next date of hearing i.e. 30.11.2021 failing which it was ordered that respondent would be at liberty to proceed in accordance with law.

15. Even on 30.11.2021 the statement was not complied with, however, petitioner came with certain proposals to amicably resolve the disputes.

16. Thereafter, the petition was taken up on 01.12.2021, 09.12.2021, 14.12.2021 and 22.12.2021. On each of the said dates it was the stand of the petitioner that they had been approaching and having meetings with the officers of the respondent for an amicable

resolution.

17. Even yesterday, when the matter was taken up a statement was made by learned senior counsel, under instructions, that the representative of the petitioner was in the office of the respondents for a meeting. Accordingly, the matter was adjourned to today.

18. Learned counsel appearing for the respondent disputes that regular meetings took place between the representative of the petitioner and the respondent as alleged. She submits that a meeting had taken place last week. But, as per her instructions, no meeting took place yesterday and the statement that the representative of the petitioner was in the office of the respondent is incorrect.

19. Learned counsel for the respondent submits that no remission has been granted to any contractor during the period of lockdown. She further submits that in view of the defaults of the Petitioner, petitioner is even otherwise not entitled to any remission.

20. Be that as it may, petitioner had categorically assured on 08.03.2021 that petitioner shall replenish the encashed performance bank guarantees in the sum of Rs.4.054 crores and continue to pay the regular license fee as per the contract. A period of three months was granted to fulfill the statement, which expired on 08.06.2021. However, the statement given to the Court was not honored.

21. Thereafter when on 31.08.2021 the default was once again brought to the notice of the Court, petitioner again failed to comply with the statement. On 10.11.2021, despite petitioner breach in breach of the statement twice over, further opportunity was granted to the petitioner to replenish the bank guarantee within 20 days but even that order was not complied with.

22. Admittedly even till date neither the performance bank guarantee has been honoured nor, as per the respondent, petitioner has paid the regular license fee in accordance with the terms of the contract.

23. This is disputed by learned senior counsel for the petitioner who submits that for the month of November, 2021, Petitioner has paid Rs. 76,85,985/- which was the higher of the two i.e. 61% of the gross collection or minimum reserve amount per month.

24. Learned senior counsel for the petitioner without prejudice submits that today petitioner is willing to replenish the bank guarantee of Rs.4.054 crores and pay a sum of Rs.5.48 crores as allegedly claimed by the respondents towards the license fee.

25. This Court is unable to accept the offer of the petitioner, as it is too late in the day to make such an offer.

26. As noticed hereinabove repeatedly time was granted on

assurances given to the Court but the assurances given to the Court were not honored. No further indulgence can be granted to the petitioner.

27. Coming to the merits of the petition, petitioner was granted a license to design, develop, implement, operate and maintain smart parking solution.

28. Section 14 of the Specific Relief Act, 1963 stipulates that where compensation in terms of money is an adequate relief for non performance of a contract, court would not direct specific performance of the contract.

29. In case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or to any understanding between the parties or for any other reason, the remedy of the petitioner would be to seek compensation for wrongful termination and not a claim for specific performance of the agreement. Accordingly, no injunction can be issued preventing a party from terminating a license.¹

30. Further it may be noticed that several disputed questions of fact are being raised in the petition *inter alia* with regard to the applicability of the *Force majeure* clause or the invocation thereof by

¹ M/s. Sai Associates vs. Delhi Wakf Board, (2017) 164 DRJ 344

the petitioner or the liability to pay contractual amount and remission from payment of license fee on account of the lockdown.

31. As noticed above, the subject contract also provides for an alternative dispute resolution mechanism by way of Arbitration.

32. In view of the above, I am not inclined to entertain the petition any further and hold that the petition is not maintainable and is accordingly dismissed.

33. It is however, clarified that this Court is neither considering nor commenting on the merits of the case of either parties. All rights and contentions of parties are reserved.

CM APPL. 32231/2021 (for liberty to terminate the contract)

34. Since the writ petition has been dismissed, no further directions are required to be passed in the application.

35. Application is disposed of.

SANJEEV SACHDEVA, J.

DECEMBER 23, 2021

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