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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% Date of decision: 12.01.2022+ **W.P.(C) 2286/2021****MUSKAN DENTAL CARE**

..... Petitioner

Through: Mr. Tanmaya Mehta, Mr. Vinod
Kumar Kaushik, Advs.

versus

DIRECTOR-MEDICAL-DELHI & ORS.

..... Respondents

Through: Mr. Vikram Jetly, CGSC for R-4/
UOI, Mr. Yakesh Anand, Mr. Akshay
Thakur, Advs. for R-1 to 3 (ESIC)**CORAM:****HON'BLE MR. JUSTICE VIPIN SANGHI****HON'BLE MR. JUSTICE JASMEET SINGH****J U D G M E N T**: **VIPIN SANGHI, J (ORAL)**

1. The petitioner has preferred the present writ petition to seek the setting aside of the order dated 07.10.2020 issued by respondent No.3, cancelling the E-Tender No. 111-V/17/11/Dental/ 2016/ Med-1, wherein the petitioner had been found to be the successful bidder.

2. The brief background facts are that in response to the tender invited by the respondent Nos. 1, 2 and 3 for setting up Single Dental Chairs at 7 dispensaries, the petitioner's bid was accepted and the petitioner was issued the communication dated 30.01.2017, asking the petitioner to deposit performance guarantee amount of Rs. 7 lakhs i.e. 1 lakh per dispensary for 7 locations within 15 days.



3. The petitioner on 03.02.2017 conveyed its acceptance and stated that it would deposit the performance guarantee amount of Rs. 7 lakhs within 15 days of the receipt of the respondent's aforesaid communication.
4. On 13.02.2017, the petitioner then submitted the performance guarantee of Rs. 7 lakhs.
5. On 16.02.2017, the respondents required the petitioner to make an upfront premium payment of Rs. 2.53 crores before signing of the MoU.
6. On 17.02.2017 i.e. the very next day, the petitioner was communicated that the Director General of the respondent ESIC had put on hold the establishment of PPP Dental Care Services in 7 ESIC dispensaries in Delhi till further orders. This communication was issued by the respondent, since there were allegations made by the unsuccessful bidders, of irregularities in the matter of award of the tender/letter of intent to the petitioner.
7. On 03.03.2017, competent authority of the ESIC withdrew the order to put on hold the services in question, which were to be provided by the petitioner on PPP Model. The petitioner was again required to make a deposit of Rs. 2.53 crores towards upfront premium vide the said e-mail dated 03.03.2017.
8. The petitioner sent a communication on 20.03.2017 requiring the respondent to allot space for establishment of the Single Chair Dental setup within the dispensary premises.
9. While the position stood thus, a civil suit was preferred being CS No. 311/2017 by one of the unsuccessful bidders, wherein the Civil Court directed maintenance of status quo regarding the subject matter of the suit— which was the tender/ contract in question.



10. With the injunction coming on as aforesaid, the matter could not proceed. The respondent communicated the said order of status quo to the petitioner on 26.04.2017. Eventually, the stay order granted by the Civil Court lapsed on 27.05.2019 i.e. after nearly 25 months of it being granted with the dismissal of the suit in default. In the meantime, the respondent ESIC had preferred a Civil Appeal against the grant of the order of status quo before the Court of the District Judge, being RCA No. 86/2017.

11. On 01.06.2019, the petitioner sent a communication that the petitioner was willing to commence the work under the contract. Petitioner states that since there was no response from the respondent ESIC, the petitioner issued a legal notice to the respondents on 26.07.2019 stating that the petitioner had suffered on account of the delay, and the petitioner sought cancellation of the letter of intent and refund of the amount of Rs. 7 lakhs deposited by it.

12. The petitioner points out that even when this communication was issued, the stand of the respondent was that no decision could be taken on the petitioner's request. Mr. Mehta submits that the stand taken by the respondent was that till the said miscellaneous appeal RCA No. 86/2017 is disposed of, the respondent ESIC could not proceed in the matter. He submits that this stand was completely misconceived inasmuch, as, with the dismissal in default of the suit itself, the said appeal also became infructuous.

13. In any event, on 31.10.2019 the petitioner withdrew its request for cancellation of the letter of intent, before its acceptance.

14. The aforesaid RCA No. 86/2017 was also withdrawn on 01.02.2020.

15. In this background, the submission of Mr. Mehta is that for no fault of the petitioner, the petitioner has been deprived of the right to work the



contract. He submits that the reason assigned by the respondent for the said cancellation is not adequately disclosed in the impugned communication dated 07.10.2020. However, the reasons were communicated by the respondent in their e-mail communication dated 09.04.2020, wherein the respondent stated that the tender related to Single Dental Chair Unit was valid for the period from March 2017 to March 2020 (3 years). Mr. Mehta submits that when the said e-mail was issued, requiring the petitioner to collect the amount of Rs. 7 lakhs deposited by it towards performance guarantee, the petitioner had repeatedly asserted its right to proceed with the contract.

16. Mr. Mehta has drawn our attention to Clause 4.1 of the RFP, which stipulates that the lock-in period under the RFP is 5 years. He submits that the reason for cancellation is therefore, *ex-facie* wrong. He further submits that another reason now taken by the respondent is that the petitioner did not deposit the premium amount of Rs. 2.53 crores. In this regard, he submits that soon after making the demand of Rs. 2.53 crores, respondent had itself put the process on hold, and thereafter the injunction intervened. He submits that the premium amount had to be submitted simultaneously with the execution of the MoU. Since no MoU was executed, the petitioner was not obliged to pay the said amount earlier.

17. In support of his submission that the petitioner should be awarded the contract and should be allowed to work for the same for a period of 5 years now, he has placed reliance to the judgment of the Supreme Court in ***Beg Raj Singh vs. State of U.P.***, [(2003) 1 SSC 726] and, in particular, Paras 7 and 8 thereof wherein the Supreme Court observed as follows:



“7. Having heard the learned counsel for the petitioner, as also the learned counsel for the State and the private respondent, we are satisfied that the petition deserves to be allowed. The ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation and the right to relief should be decided by reference to the date on which the petitioner entered the portals of the court. A petitioner, though entitled to relief in law, may yet be denied relief in equity because of subsequent or intervening events i.e. the events between the commencement of litigation and the date of decision. The relief to which the petitioner is held entitled may have been rendered redundant by lapse of time or may have been rendered incapable of being granted by change in law. There may be other circumstances which render it inequitable to grant the petitioner any relief over the respondents because of the balance tilting against the petitioner on weighing inequities pitted against equities on the date of judgment. Third-party interests may have been created or allowing relief to the claimant may result in unjust enrichment on account of events happening in-between. Else the relief may not be denied solely on account of time lost in prosecuting proceedings in judicial or quasi-judicial forum and for no fault of the petitioner. A plaintiff or petitioner having been found entitled to a right to relief, the court would as an ordinary rule try to place the successful party in the same position in which he would have been if the wrong complained against would not have been done to him. The present one is such a case. The delay in final decision cannot, in any manner, be attributed to the appellant. No auction has taken place. No third-party interest has been created. The sand mine has remained unoperated for the period for which the period of operation falls short of three years. The operation had to be stopped because of the order of the State Government intervening which order has been found unsustainable in accordance with stipulations contained in the mining lease consistently with GO issued by the



State of Uttar Pradesh. Merely because a little higher revenue can be earned by the State Government that cannot be a ground for not enforcing the obligation of the State Government which it has incurred in accordance with its own policy decision.

8. For the foregoing reasons, the appeal is allowed with costs. The impugned order of the High Court, dismissing the petition filed by the appellant, is set aside. Instead, it is directed that the petitioner shall be allowed to operate the mine for a full period of three years subject to adjustment for the period for which he has already operated. The appellant shall remain liable to pay royalty and make other payments to the State Government in accordance with the terms of the lease.”

18. On the other hand, Mr. Anand, who appears for respondent Nos. 1,2 and 3 submits that even the period of 5 years starting February, 2017 is nearly over, inasmuch as we are already on 12.01.2022. He submits that the respondents may not be even interested in issuing a fresh tender of the same nature, since the respondent has set up its own Dental College. He further submits that with the passage of time, even if a fresh tender were to be floated, the respondent is likely to get much higher rates as nearly 6 years have elapsed, since the last tender was invited, when the petitioner had participated. He further submits that the petitioner was also recalcitrant and not very serious in following up the judicial proceedings. The petitioner had left it entirely to ESIC to pursue the litigation and to have the stay vacated, even though the petitioner was also a party. In its own interest, the petitioner should have pursued the proceedings diligently to have the stay vacated, which was not done. The legal notice issued by the petitioner on 26.07.2019, was issued after nearly 2 months of the stay order passed by the Civil Court getting dissolved on 27.05.2019. Even if the submission that the respondent



ESIC should not have waited for disposal of RCA No. 86/2017 to proceed with the execution of the contract were to be accepted, the petitioner should have agitated the said aspect soon after the stay was vacated/ got dissolved on 27.05.2019, and not waited for the withdrawal of the RCA aforesaid, which happened on 01.02.2020. He further submits that the respondent corporation works for the benefit of its registered beneficiaries, and has to generate revenues to meet its objectives. Therefore, the decision in **Beg Raj Singh** (*Supra*) would not be attracted. In fact, he places reliance on same passage on which Mr. Mehta had placed reliance to submit that this not a fit case where the Court should direct grant of contract to the petitioner at this belated stage at the same rate, in respect of an entirely different/ later five year period.

19. Having heard learned Counsels, we are of the view that in the present facts and circumstances, the petitioner is not entitled to the revocation of the cancellation at this belated stage, when the term of the contract – even if it is taken as 5 years, is practically over. The rates that were bid by the petitioner were so bid in the year, 2016, when the tender was invited. To now allow the petitioner to work the contract for a period of 5 years on the same rates which were quoted 6 years earlier, will not be fair to the respondent, even if the respondent decided to avail of the services under the same PPP Model in today's date. If the respondent ESIC were to invite a fresh tender, they are likely to get enhanced rates on account of the general inflation which has taken place over a span of 5 to 6 years. Evidently, the respondent ESIC invited the tender in question to be able to provide dental services to its beneficiaries, with the twin object of also generating revenue for itself, to meet its objectives. That objective of the respondent would be jeopardised if



they were required to grant the contract to the petitioner for a period of five years now at the same rates at which the letter of intent was issued to the petitioner. This distinction persuades us to distinguish the present case from *Beg Raj Singh (supra)*.

20. The petitioner could have approached the Court when the term of the contract was not over. Petitioner could have actively followed up the civil suit, wherein the order of status quo was passed. Petitioner could have also, itself, appealed against the said order. The petitioner could have approached the Court even after vacation/dissolution of the order dated 27.05.2019, in case, it found the respondent/ESIC was unjustifiably waiting for the disposal of RCA No. 86/2017. However, the petitioner did not do anything of that sort. In fact, the petitioner itself proceeded to issue the legal notice dated 26.07.2019 seeking termination of the Letter of Intent. No doubt, the same was subsequently withdrawn on 31.10.2019, but this all meant that there was wastage of time.

21. Pertinently, the intention of the respondent not to proceed with the tender became known to the petitioner, as early as on 09.04.2020. The petitioner did not approach the Court then. In these circumstances, we are not inclined to grant the relief as sought by the petitioner. The decision in ***Beg Raj Singh (supra)***, in our view, does not come to the aid of the petitioner.

22. We, therefore, dismiss this petition. At the same time, we leave it open to the petitioner to avail of other civil remedies, in case the petitioner is so advised. The respondent shall however proceed to refund the amount of Rs. 7 lakhs deposited by the petitioner within the next 2 weeks. We make it clear that the observations made by us, hereinabove, have been made for the



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purpose of deciding the present petition and shall not come in the way of either party, in case the petitioner were to lay a civil claim.

VIPIN SANGHI, J

JASMEET SINGH, J

JANUARY 12, 2022/ dm

