

**IN THE HIGH COURT AT CALCUTTA
(CIVIL APPELLATE JURISDICTION)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Subrata Talukdar

And

The Hon'ble Justice Hiranmay Bhattacharyya

**RVWO/25/2022
Arising Out of
APO/163/2019
With
WPO/338/2018
IA No. GA/1/2022, GA/2/2022**

**The Kolkata Municipal Corporation & Ors.
VS
M/s. Jaganath Enterprise & Ors.**

-And-

**RVWO/26/2022
Arising Out of
APO/164/2019
With
WPO/338/2018
IA No. GA/1/2022, GA/2/2022**

**The Kolkata Municipal Corporation & Ors.
VS
M/s. Impulse Health Care & Ors.**

For the Appellants

: Mr. Kishore Dutta, Sr. Adv.
Mr. Gopal Ch. Das
Mr. Subhrangsu Panda
Ms. Ina Bhattacharyya

Ms. Mithu Sigha Mahapatra

For Respondents : Mr. Anant Kr. Shaw

Mr. Mainak Ganguly

Heard on : 11.01.2023

Judgment on : 23.03.2023

Subrata Talukdar, J.:- By way of filing the present review applications, being RVWO 25 of 2022 and RVWO 26 of 2022, the review applicants seek review of the common Judgement and Order dated 11th of March, 2021 passed by the Hon'ble Division Bench in the set of analogous appeals being APO 163 of 2019 and APO 164 of 2019.

By the said Judgement and Order dated 11th of March, 2021, the Hon'ble Division Bench, *inter alia*, affirmed the common Order dated 27th of September, 2019 passed in two writ petitions being WP No. 337 of 2018 and WP No. 338 of 2018 by the Hon'ble Single Bench. The Hon'ble Single Bench had, *inter alia*, allowed the two writ petitions by directing the respondents therein, the Kolkata Municipal Corporation (for short the *KMC*), to pay the writ petitioners namely, Ms. Jagannath Enterprise and Ms. Impulse Health Care, the rates at which medicines were contractually procured from the writ petitioners.

The Hon'ble Single Bench had also recorded a *concession* made by Learned Senior Counsel appearing for the *KMC* to extend the time to make payment of the rates as directed at Paragraph 14 of the final Judgement and

Order dated 27th of September, 2019 (*supra*) by a period of four weeks after the reopening of the Court after the long Puja Vacation.

In the appeals, being APO 163 of 2019 and APO 164 of 2019, filed by the *KMC* challenging the common Judgement and Order dated 27th of September, 2019, the appellants/*KMC*, *inter alia*, pleaded the following grounds.

“IV. For that the Hon’ble Judge failed to consider the provision of Sections 45 and 46 of the Kolkata Municipal Corporation Act, 1980 and consequently the scope and effect thereof and as such the Hon’ble Court arrived at erroneous observations/findings that there was contract between the writ petitioner company and the Kolkata Municipal Corporation.

V. For that the Hon’ble Judge should have considered that the contract, if any, which is not entered into in accordance with the provision of the Act or any regulation made thereunder shall not be binding upon the corporation.

VI. For that the Hon’ble Judge should have considered that since the medicines as supplied by the writ petitioners on such purported purchase orders appeared to have been utilized, the Kolkata Municipal Corporation decided to pay the price of the medicines at the approved rate of the government.

X. For that the Hon’ble Judge should have appreciate that when there was no contract under the law and the contract if any, did not bind the Kolkata Municipal Corporation under the law, there is no reason to offer the price of medicines as mentioned in the purported purchase orders.”

Interestingly, while the Grounds of Appeal in both APO 163 of 2019 and APO 164 of 2019 relate only to the point pertaining to the sanctity of the contract for supply of medicines *qua* the vendors the writ petitioners and the *KMC*, no ground of appeal has been pleaded in APO 163 of 2019 and APO 164 of 2019 connected to the *concession* recorded by the Hon'ble Single Bench of the Learned Counsel appearing for the *KMC* to pay within the extended period of four weeks (*supra*).

Upon the final Judgement and Order of the Hon'ble Single Bench dated 27th of September, 2019 being considered in the two analogous appeals, i.e. APO 163 of 2019 and APO 164 of 2019, this Hon'ble Division Bench was pleased to decide the said two appeals, *inter alia*, by a common order dated the 11th of March, 2021. This Hon'ble Division Bench was pleased to, *inter alia*, find that contrary to the case made out by the appellant *KMC* that the Purchase Order for supply of medicines was the handiwork of only one officer namely, the Superintendent of the Central Medical Stores, *KMC*, it would transpire from the record that the said Purchase Order was signed by three officers of the *KMC* including, the Superintendent of Medical Stores.

This Hon'ble Division Bench upheld the findings of the Hon'ble Single Bench affirming the view that after supplies of medicines were effected in terms of the Purchase Order, there could be no further change in the terms of supply as well as the payment of rates agreed upon by and between the parties. It was further held by this Hon'ble Division Bench that with the parties having taken a step in the contract with the *KMC* accepting the

supply of medicines, no inconsistency can be imputed into the portion of the order by which the Hon'ble Single Bench recorded the *concession* of Learned Counsel for the *KMC* to pay within the extended period.

This Court took further judicial notice of the fact that since the appellants/the *KMC* did not take steps before the Hon'ble Single Bench to clarify the *concession* as recorded in the Order dated 27th of September, 2019 and no Ground thereto were taken in the *Memorandum of Appeal* to question the concession, the *KMC* must be held to be bound by the clear terms of the Order dated 27th of September, 2019.

The appellants/the *KMC* thereafter approached the Hon'ble Apex Court by way of two Special Leave Petitions which were both dismissed as withdrawn with liberty granted to the petitioners/*KMC* to take *recourse to appropriate remedies in accordance with law including making an appropriate application before the High Court*.

Hence these Review Applications.

Now, it would be useful for this discussion to note the Grounds of Review in both the applications which, *inter alia*, read as follows:-

"II. For that the Hon'ble appeal court ought to have considered and committed wrong in not appreciating that the sentence being "the payment as directed made within a fortnight from the date of communication of the order". Ought to have read as substituted by the sentence- "the time to make payment as in paragraph no. 14 of the judgment is extended by a period of 4 weeks after reopening of the court after a long vacation".

III. For that Hon'ble appeal court committed wrong in considering the incorporated sentence in paragraph 14 of

the judgment as recorded after delivery of the judgment, render the appellants non-suited at the threshold qua concession.

VI. For that Hon'ble appeal court ought to have considered and committed wrong in not considering that if the said prayer of the Learned Advocate of the appellants is treated to be the concession, the same doesn't bind the statutory body being the Kolkata Municipal Corporation in much as alleged concession was not given on instruction of the appellants.

VII. For that the Hon'ble appeal court erroneously preceded that the medicines were supplied against the work order without considering that the alleged work order was given by the superintendent of the Central Medical stores without having been authorised by the Kolkata Municipal Corporation.

IX. For that the Hon'ble appeal court failed to read the provisions of sections 45 and 46 of the Kolkata Municipal Corporation act, 1980, which provides inter alia who and how an officer can enter into a contract on behalf of the Kolkata Municipal Corporation and Section 46(2) of the Kolkata Municipal Corporation Act, 1980 specifically provides that "No Contract which is not enter into in accordance with the provision of the Act or any regulation made thereunder shall be binding on the corporation".

X. For that the Hon'ble Appeal Court ought to have held that the alleged work order issued by the Superintendent, Central Medical Stores unilaterally without having been authorized does not create any contract between the Kolkata Municipal Corporation and the writ petitioner under Section 45 of the Kolkata Municipal Corporation Act, 1980 to bind the corporation."

Therefore, to the mind of this Court, the Grounds taken in the review applications are *pari materia* to the Grounds already taken in the appeals in so far such grounds question the maintainability of the contract between the writ petitioners/the vendors and the *KMC*. These Grounds are not new Grounds at all and stand carefully adjudicated by the Judgement and Order of the Hon'ble Division Bench dated the 11th of March, 2021. The arguments placed by Learned Senior Counsel appearing for the *KMC* on the touchstone of Sections 45 and 46 of the *KMC* Act are arguments which were already part of the Grounds of Appeal before the Hon'ble Division Bench in APO 163 of 2019 and APO 164 of 2019.

In other words, the review applicants are merely *pouring old wine into a new bottle*. No additional Grounds pleaded on which the review applicants can persuade this Court to take a fresh look at its Appellate Judgement and Order dated 11th March, 2021. The tests of applying for a review are altogether absent. There is no material which, inspite of exercise of due diligence, the *KMC* could not bring to the notice of the Hon'ble Division Bench at stage time of hearing of the appeals. There are also no materials to show that the Hon'ble Division Bench erred in appreciating the materials on record or, committed an error on the face of the record. Sections 45 and 46 of the *KMC* Act were also there when the Hon'ble Division Bench was pleased to adjudicate the binding nature of the contractual obligations by and between the parties.

Therefore, on the above Grounds, the review applications are liable to fail.

Next, arguably the only additional Ground for filing the review applications are the Grounds pertaining to the nature of the *concession* as recorded by the Hon'ble Single Bench in its Order dated 27th September, 2019 beginning with the word *Later*. To the mind of this Court, the *KMC* has attempted to make out a novel argument that the grant of extension of time must be construed purely in relation to the time of a fortnight initially granted by the Hon'ble Single Bench to pay the dues. The case therefore made out by the *KMC* in the Review is that contrary to a common understanding of the word *concession*, it was the desire of the Hon'ble Single Bench, subsequently expressed, that the dues be paid within the extended period of four weeks instead of the fortnight as originally granted.

The review applicants thus seek to side-step the *concession* as recorded by the Hon'ble Single Bench by removing its association with their Learned Counsel and bringing it closer to the magnanimity of the Court. As a measure of abundant caution, Learned Senior Counsel for the *KMC* has also relied on 2019) 10 SCC 674 and 2015) 7 SCC 373 to argue the proposition that the concession, if at all, made by its Learned Counsel cannot be treated as binding. Furthermore, such *concession* being contrary to statute, i.e. Sections 45 and 46 of the *KMC* Act, is not binding on the review applicants.

However, this Court finds that the ratio of the Judgement reported in 1982) 2 SCC 463 is *apropos* the flow of facts emanating from the findings of

the Hon'ble Single Bench as affirmed in appeal. Paragraphs 4, 5, 6, 7, 8, 10 and 11 of 1982) 2 SCC 463 read as follows:-

"4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation".(1) We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with

regard to his conduct was a statement that had been made in error. (2) That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.

5. In *Rev. Mellor*, 7 Cox. P.C. 454 Martin was reported to have said:

"we must consider the statement of the learned judge as absolute verity and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court which of itself implies an absolute verity".

6. In *King Emperor v. Barendra Kumar Ghose*, said:

".. ...these proceedings emphasise the importance of rigidly maintaining the rule that a statement by a learned judge as to what took place during the course of a trial before him is final and decisive; it is not to be criticised or circumvented; much less is it to be exposed to animad version".

7. In *Sarat Chandra v. Bibhabati Debi Sir Asutosh Mookerjee* explained what had to be done:

"..... It is plain that in cases of this character where a litigant feels aggrieved by the statement in a judgment that an admission has been made, the most convenient

and satisfactory course to follow, wherever practicable, is to apply to the Judge without delay and ask for rectification or review of the judgment"

8. So the judges, record is conclusive. Neither lawyer nor litigant may claim to contradict it, except before the judge himself, but nowhere else.

10. We may add, there is nothing before us to think that any such mistake occurred, nor is there any ground taken in the petition for grant of special leave that the learned judges proceeded on a mistaken view that the learned counsel had made a concession that there might arise circumstances, under which the Governor in granting sanction to prosecute a Minister must act in his own discretion and not on the advice of the Council of Ministers. The statement in the judgment that such a concession was made is conclusive and, if we may say so, the concession was rightly made. [n the facts and circumstances of the present case, we have no doubt in our mind that when there is to be a prosecution of the Chief Minister, the Governor would, while determining whether sanction for such prosecution should be granted or not under Section 6 of the Prevention of Corruption Act, as a matter of propriety, necessarily act in his own discretion and not on the advice of the Council of Ministers.

11. The question then is whether we should permit the State of Maharashtra to resile from the concession made before the High Court and raise before us the contention now advanced by the learned Attorney General. We have not the slightest doubt that the cause of justice would in no way be advanced by permitting the State of Maharashtra to now resile from the concession and agitate the question posed by the learned Attorney

General. On the other hand we are satisfied that the concession was made to advance the cause of justice as it was rightly thought that in deciding to sanction or not to sanction the prosecution of a Chief Minister, the Governor would act in the exercise of his discretion and not with the aid and advice of the Council of Ministers. The application for grant of special leave is, therefore, dismissed.”

Therefore, to the mind of this Court the nature of the *concession* recorded by the Hon’ble Single Bench is such that no other or different understanding thereof can be assumed, presumed and/or derived *de hors* the primary reasoning that the *KMC* is bound by its contractual obligations. It is impossible to argue that the *concession* was recorded out of the blue by the Hon’ble Single Bench on its own. Implicitly in the recording of the *concession* lies the acknowledgement by Learned Counsel of the primary reasoning (*supra*) that is part and parcel of the order of the Hon’ble Single Bench.

Before parting with this discussion, this Court cannot help but notice that the *KMC* has dragged the litigation from Court to Court resulting in a situation whereby the *KMC* has utilised the medicines supplied by the vendors/the appellants and denied them their dues for now nearly four years.

For the above stated reasons, the Review Applications must fail.

RVWO/25/2022 and **RVWO/26/2022** stand accordingly **dismissed**.

Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I agree.

(Hiranmay Bhattacharyya, J.)

(Subrata Talukdar, J.)