

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

Date of decision: 10th APRIL, 2023

IN THE MATTER OF:

+ **LPA 145/2021 & CM APPLs. 13983/2021, 13984/2021, 13986/2021, 25149/2021, 25150/2021, 32156/2021, 32157/2021, 32159/2021, 40902/2021, 40903/2021, 1728/2022, 1729/2022, 1730/2022, 4872/2022, 12650/2022**

MEP INFRASTRUCTURE DEVELOPERS LTD Appellant

Through: Mr. Dushyant Dave, Senior Advocate
with Mr. Rajiv Shankar Dvivedi, Mr.
Mahesh Agarwal, Mr. Karan Luthra,
Ms. Aarashi Tiku, Mr. Akshat and
Mr. Rishabh Jain, Advocates

versus

SOUTH DELHI MUNICIPAL CORPORATION AND OTHERS
..... Respondents

Through: Mr. Sanjay Vashishtha, Standing
Counsel for MCD with Mr. Phagun
Kalra, Mr. Vishal Kumar, Advocates

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J.

1. The instant Letters Patent Appeal arises out of Judgment dated 09.04.2021 passed in W.P.(C) No. 2241/2020 wherein the Ld. Single Judge dismissed the Writ Petition and held that the Appellant herein cannot invoke the extraordinary writ jurisdiction of the High Court under Article 226 of the Constitution of India and the disputes arising between the parties ought to be

resolved in accordance with the Contract Act and in appropriate civil proceedings before the appropriate Court.

2. Shorn of Details, the facts necessary for adjudication of the present dispute are as under:

- i. On 21.07.2017, the Respondent Corporation floated a tender bearing NIT No. ADC/TT/HQ/2017/D-311, inviting bids from interested parties to collect Toll Tax & Environment Compensation Charge (ECC) from specified commercial vehicles at the 124 toll plazas/posts/barriers bordering Delhi.
- ii. The Appellant submitted its bid for the aforesaid NIT and was declared as the successful bidder and the Appellant's bid was accepted by way of a Letter of Intent dated 19.09.2017.
- iii. Thereafter, on 28.09.2017, the Appellant and Respondent Corporation entered into a Toll Tax & ECC Collection Agreement (*hereinafter referred to as the "Contract Agreement"*).
- iv. It is stated that as per the terms of the Contract Agreement, the Appellant was entitled to collect penalty from specified commercial vehicles evading toll tax by using free lanes. The Appellant wrote multiple letters to the Respondent Corporation informing them of several vehicles which are using free lanes to avoid paying toll tax, and that the Appellant is unable to deploy its officials on the free lanes to collect toll tax and penalty
- v. On 27.05.2018, the Eastern Peripheral Expressway was opened for general public use.

- vi. Thereafter, on 20.07.2018, a strike was called by the All India Motor Transport Congress. The Appellant, *vide* letter dated 23.07.2018 claimed that the strike amounted to a *force majeure* event and on 29.09.2018 claimed a set off of Rs. 5.96 Crores from the toll tax payable by the Appellant.
- vii. It is stated that on 08.11.2018, the Respondent Corporation issued a letter to stop the entry of heavy and medium goods vehicles from 11:00PM on 08.11.2018 till 11.11.2018. Thereafter, on 12.11.2018, the Respondent Corporation issued a letter to the Appellant to allow the entry of trucks into Delhi but not to collect Toll Tax and ECC from them so they are not forced to stop. Subsequently, on 15.11.2018, the Appellant submitted a claim for the loss suffered by it on account of restrictions on entry of vehicles in Delhi as well as restrictions on collection of Tax and ECC.
- viii. Thereafter, on 16.01.2019, a meeting of the High-Level Committee of the Respondent Corporation took place wherein it was deliberated that the traffic entering Delhi had reduced due to opening of the Eastern & Western peripheral Expressways and a decision was taken to appoint a Surveyor to assess the reduction in traffic count. Accordingly, on 13.02.2019, a tender was floated for conducting the traffic survey and M/s Samarth Softech Solution Ltd. was awarded the work on 08.03.2019. It is stated that the survey was conducted in April 2019 and as per the report submitted, the expected average weekly estimated revenue for all 124 MCD entry

points was Rs. 19.25 crores taking into consideration all aspects.

- ix. It is stated that between 13.08.2019 and 26.08.2019, another survey was conducted by Tescidel India Pvt. Ltd. who were appointed by the Respondents. As per the report submitted for this survey, a daily average of 35,315 vehicles were evading the payment of toll tax by using free lanes. The survey calculated the estimated amount of evasion per day at Rs. 36,81,900/-.
- x. During this time, the Appellant raised various other claims of money from the Respondent Corporation and in response, a meeting of the High-Level Committee of the Respondent Corporation took place on 17.10.2019 which rejected the claims of the Appellant amounting to Rs. 446,46,55,339/- but approved the claim of Rs. 18,98,54,798/-.
- xi. On 18.11.2019, while the recommendations of the high-level committee were pending consideration before the Competent Authority, the Respondent Corporation issued a demand notice upon the Appellant asking them to deposit a sum of Rs. 450.69 Crores and a penalty amount of 0.1% per day i.e. 36.5% per annum.
- xii. The Appellant challenged the aforesaid demand letter dated 18.11.2019 before this Court *vide* Writ Petition (Civil) No. 12483/2019. This Court *vide* order dated 26.11.2019 disposed of the said writ petition.
- xiii. Subsequently, on 16.12.2019, the Respondent No. 2, for the first-time exercised its power conferred upon him under Clause

5.1 of the RFP and appointed a competent officer as its representative.

- xiv. On 20.12.2019, the Appellant requested Respondent No. 2 to appoint an independent adjudicator to adjudicate the disputes between the parties. The Appellant made the same request again on 30.12.2019. Eventually, on 07.01.2020, the Appellant formally moved an application before Respondent No. 2 for appointment of an Independent Adjudicator.
- xv. In January 2020, the Appellant filed Writ Petition No. 570/2020 before this Hon'ble Court seeking adequate directions to the Respondent to enable it to collect toll tax/penalty from specified commercial vehicles evading the same using free lanes.
- xvi. It is stated that on 21.01.2020, while the Appellants were insisting for the issue of appointment of an independent adjudicator to be appointed, the Competent Officer appointed by Respondent No. 2 continued with hearing of the disputes that arose between the parties and passed an order on 31.01.2020. Pursuant to this order, a demand notice dated 14.02.2020 was served on the Appellant asking it to pay a sum of Rs. 756.56 Crores within 14 days.
- xvii. Challenging the Order dated 31.01.2020 and the Demand Notice dated 14.02.2020, the Appellants filed the underlying writ petition on 19.02.2020 praying for the following reliefs:-

“a. Issue of a writ of mandamus or any other appropriate writ and appoint an independent

Adjudicator to adjudicate the claims of the Petitioner;

b. Issue a declaratory writ to the effect that clause 16 of the agreement which provides for adjudication mechanism has been left unworkable on account of actions and inactions of the SDMC Commissioner;

c. Issue a writ of certiorari and quash the order dated 31.01.2020 passed by the Commissioner SDMC.

d. Quash the Impugned Notice dated 14.02.2020 issues consequent to the impugned Order.

e. During the pendency of the writ petition, stay the Impugned Notice dated 14.02.2020;

f. Issuance a suitable writ, order and direction declaring that in the guise of section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 the Petitioner cannot be compelled to pay to the Respondent no.1 more than the actual amount collected towards toll tax from commercial vehicles entering the NCT, Delhi;

g. Issue a writ in the nature of mandamus directing the Respondents to make a fresh assessment as to the circumstances affecting toll collection taking into account the circumstances highlighted by the Petitioner and reassess and redetermine the annual/ weekly amount payable by the Petitioner to the SDMC towards toll tax;

h. Issue a writ in the nature of mandamus directing the Respondents to take into consideration the change in circumstances make

suitable downward revision in the weekly/ annual remittance commensurate with the reduction in toll taxpaying commercial vehicles and taking into account the tax leakages on account of freelanes;

i. Issue a writ in the nature of certiorari quashing the demand of 0.1 % per day that is 36.5% per annum in the demand letter dated 18.11.2019 as being in terrorem and inequitable.

iA. Be pleased to quash the letter of termination dated 16.03.2020 issued by the Respondent to the Petitioner.

iB. Be pleased to quash the NIT dated 28.04.2020 issued by the Respondent consequent to the notice of termination dated 16.03.2020.

iC. During the pendency of this Writ Petition, pass ad interim order directing the Respondent to keep in abeyance the Termination Notice dated 16.03.2020 as well as NIT dated 28.04.2020 for fresh bidding for collection of tax, till the final disposal of the instant writ petition.

j. To issue a Writ order or direction in the nature of CERTIORARI and quash the Termination Notice dated 16.03.2020 and subsequent extension of termination date issued by the Respondent as being illegal.

k. To issue a Writ order or direction in the nature of CERTIORARI and quash the NIT dated 27.04.2020 issued by the Respondent consequent to the notice of termination dated 16.03.2020.

l. During the pendency of this Writ Petition, pass ad interim order directing the Respondent to keep

in abeyance the Termination Notice dated 16.03.2020 and subsequent extension of termination date as well as NIT dated 27.04.2020 for fresh bidding for collection of tax, till the final disposal of the instant writ petition.

m. Direct that the money appropriated by the Respondent byway of encashment of bank guarantee for Rs. 64 Crore, will be held by the Respondent as a security deposit after adjusting therefrom the amount payable by the Petitioner towards the ECC.”

- xviii. The Writ petition came up before the Court on 02.03.2020 wherein the Court stayed the operation of the impugned order and demand. The Appellant being aggrieved by a portion of this order preferred LPA No. 139/2020. It is stated that the Appellant had also preferred another LPA bearing LPA No. 140/2020 against the order dated 26.11.2019 passed in W.P.(C) No. 12483/2019. On the same date, i.e., 02.03.2020, the Appellant was directed to deposit the arrears i.e. Rs. 115.04 Crores in three equal monthly instalments and also continue to pay Rs. 20 Crores per week.
- xix. On 16.03.2020, the Respondent issued a letter of termination against the Appellant under Clause 17.3(a) of the Contract Agreement. On 16.03.2020, a fresh Notice Inviting Tender was issued by the Respondent Corporation which was annulled on 04.04.2020.
- xx. In response, the Appellant *vide* letters dated 19.03.2020 and 24.03.2020 notified the Respondent that the Pandemic declared

is a *force majeure* event. It is also stated that the interim protection granted by the Court *vide* order dated 02.03.2020 was extended through an order dated 25.03.2020 passed by the High Court.

- xxi. Thereafter, on 06.04.2020, another fresh NIT was issued by the Respondent Corporation and as per the NIT, the bids were opened on 27.04.2020. It is stated that although 11 prospective bidders had participated in the pre-bid process, but in the tender bidding process, only one bid was received. Therefore, the said NIT dated 06/04/2020 was cancelled on 28/04/2020.
- xxii. Subsequently, another fresh NIT was issued on 28/04/2020. As per this NIT the date of opening the bid was on 12/05/2020 which was extended to 15/05/2020. As per this NIT, any applicant black-listed by SDMC or any other Government Organisation/Ministry/PSU shall not be eligible to participate in the tender.
- xxiii. In the meantime, the Appellant had sought modification of the order dated 02.03.2020, which was modified by an order dated 12.06.2020. As per the modified order, while the order for payment of arrears was maintained, but the order for payment of Rs. 20 Crores per week was suspended in view of the *force majeure* clause. It is stated that Appellant was directed to deposit the amounts collected by the Appellant into the account of the Respondent SDMC after deduction of 15% towards operation and maintenance charges, subject to final adjustment.

- xxiv. The Appellant thereafter filed a review petition seeking modification of the order dated 12.06.2020, however the said review petition was dismissed.
- xxv. In the meantime, the SDMC filed LPA 165/2020 challenging the order dated 12.06.2020 and the Appellant also filed LPA 167/2020 challenging the order dated 24.06.2020 dismissing the review petition.
- xxvi. Thereafter on 06.11.2020, both the LPAs were heard at great length on the merit of the case. Finally, after hearing both the parties, both the LPAs were disposed of vide judgement dated 06/11/2020 directing as under:

"1) The Force Majeure clause stands invoked w.e.f. 26.03.2020 in terms of OM dated 18.05.2020 issued by MORTH, Govt. of India and it shall stand revoked when 90% traffic, in comparison to the traffic before lockdown period of weekly basis, stands resumed.

2) The SDMC shall be entitled to weekly payments of Rs.20.00 crores till 25.03.2020 and after resumption of 90% traffic in comparison to the pre-lockdown period on weekly basis during pendency of the writ petition. Arrears of Rs.115.04 crores are held to be cleared without being affected by Force Majeure clause.

3) With effect from 26.03.2020 till resumption of 90% traffic in comparison to pre-lockdown period on weekly basis, MEP shall continue to deposit entire collection of toll tax, ECC, cash received from sale of monthly passes, fast tag stickers and any other revenue generated from any toll collection in the bank accounts of SDMC on daily basis by next

day after deduction of administrative and toll collection expenses @7.5%. Excess administrative and toll collection expenses deducted by MEP are to be deposited by MEP with SDMC in 15 days.

4) *Ld. Single Judge may order for an exercise to be conducted by a reputed agency to estimate the flow of traffic passing through toll gates managed by MEP from 26.03.2020 onwards on the basis of the available data and material. In the meantime, SDMC is at liberty to get the regular inspections done at toll plazas or to install CCTV or any other mechanism to count the vehicles passing through toll gates till 90% traffic is resumed.*

5) *The finding of the learned Single Judge regarding termination notice dated 16.03.2020 is upheld as it was issued a day in advance.*

6) *The full Bench order dated 25.03.2020 cannot be read to mean that MEP can take benefit of the interim stay order without complying with the conditions mentioned in the said order.*

8) *There is no occasion to appoint a Retired Judge to adjudicate the dispute at this stage. However, the Ld. Single Judge may explore the possibility of referring the matter to alternative dispute resolution with consent of parties.*

7) *Date of hearing before the Ld. Single Judge is preponed to 24th November, 2020 and the Ld. Single Judge is requested to decide the Writ Petition expeditiously. Both the parties shall extend full cooperation in this regard."*

xxvii. The Judgment dated 06.11.2020 was challenged by the Respondent before the Hon'ble Supreme Court of India by way

of SLP (C) No. 15173 of 2020 and the said SLP was dismissed on 12.01.2021 directing expeditious disposal of the writ petition.

xxviii. Thereafter, the Ld. Single Judge, heard the arguments of the parties in the underlying writ petition and reserved the judgment on 15.03.2021, which was delivered on 09.04.2021. The learned Single Judge dismissed the writ petition by holding that the writ jurisdiction of this Court cannot be invoked by a party who wants to avoid the contractual obligations or attempts to modify the terms of the contract. The learned Single Judge held that the writ court should not exercise its powers under Article 226 of the Constitution of India which has the effect of obstructing the exercise of contractual rights. The learned Single Judge held that the writ petition was an attempt by the Petitioner (Appellant herein) to re-write the contract and that the Appellant has not been able to make out the case as to why the writ court must exercise its jurisdiction under Article 226 of the Constitution of India, and that the conduct of the Respondent is so arbitrary or discriminatory so as to force a writ court to interfere in the facts and circumstances of the present case.

xxix. At this Juncture, it is pertinent to mention here that, after dismissal of the writ petition by this Court, the Appellant had approached the High Court of Bombay by filing a writ petition i.e., Writ Petition No.10304/2022 with following prayers:

"a. *Issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate orders or directions calling for the records of the case pertaining to the Impugned Notices (Exhibit-A-1 & A-2), the Impugned Warrants of Distress (Exhibit-C-1, C-2 & C-3) the Impugned 2nd Set of Warrants of Distress (Exhibit-OO-1, OO-2) and Impugned Attachment Notices (Exhibit-PP-1 & PP-2) issued by Respondent No. 4, and after perusing the legality and propriety of the process, be pleased to quash and set aside the same;*

b. *this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the Respondents No. 9 to 12 from taking any action against the Petitioner pursuant to and/or in furtherance of and/or implementation of the Impugned Notices and Impugned Attachment Notices.*

c. *this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the Respondents No. 6 to 8 from taking any action against the Petitioner pursuant to and/or in furtherance of and/or implementation of the Impugned Warrants of Distress;*

(c-1) this Hon'ble Court be pleased to issue a writ of mandamus, or a writ in the nature of mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the Respondents No. 11 and 12 from taking any action against the Petitioners pursuant to and/or in furtherance of and/or implementation of the 2nd set

of Warrants of Distress and Impugned Attachment Notices."

xxx. The Division Bench of High Court of Bombay *vide* Order and Judgment dated 01.02.2023 dismissed the writ petition.

3. Mr. Dushyant Dave, learned Senior Counsel appearing for the Appellant, at the outset, submits that the present dispute between the Appellant and the South Delhi Municipal Corporation arises out of the contract agreement executed between the parties on 28.09.2017. He has submitted that Respondent/Corporation has been created under the Delhi Municipal Corporation Act, 1957 and is, therefore, amenable to the extraordinary writ jurisdiction of the Courts under Article 226 of the Constitution of India. It is the submission that the learned Single Judge has made an error in dismissing the writ petition and holding that the writ petition is not maintainable when the present case is one which ought to be adjudicated by a constitutional Court in exercise of its writ jurisdiction.

4. Mr. Dave submits that the Appellant herein had on multiple occasions requested the Respondent/SDMC to appoint an independent adjudicator for adjudication of claims of the Appellant but such a request was never accepted by the Respondents. He has brought to our attention to an Order dated 26.11.2019 passed in W.P.(C) 12483/2019 wherein the learned Single Judge has stated that the "He may give a hearing to the petitioner within four weeks from today. If the Commissioner so desires, he may nominate a retired judge of this Court for the necessary hearing and passing of a reasoned order". He has also brought to our attention various Orders of this Court wherein a request was made to the Respondents to refer the matter to arbitration.

5. It is further submitted by Mr. Dave that instead of appointing an independent adjudicator or considering the request of the Appellant to refer the matter to arbitration, the Respondents have raised a huge amount of claims against the Appellant which lack any basis in the contract agreement or any legislation. He states that the Appellant has also raised claims which have never been adjudicated by an independent body and the adjudication by the Respondents is without any reasoning and in violation of principle of natural justice as it is the Respondent/SDMC which has acted as a Judge.

6. Mr. Dave has placed heavy reliance upon the decision of Hon'ble Supreme Court in Radha Krishan Industries vs. State of Himachal Pradesh and Ors., **2021 SCC OnLine SC 334** and on Unitech Limited and Others vs. Telangana State Industrial Infrastructure Corporation (TSIIC) and Others, **2021 SCC OnLineSC 99** to submit that the existence of an alternate remedy is not a bar on a High Court in exercising its jurisdiction under Article 226 of the Constitution of India. He submits that there are three exceptions to the rule of bar on exercise of writ jurisdiction when there is an alternate remedy which is; first when the writ petition has been filed for the enforcement of fundamental rights; second when there has been a violation of principal of natural justice; and third when the order or proceedings is wholly without jurisdiction or the vires of an act is challenged.

7. It is submitted by Mr. Dave that the writ petition filed by the Appellant was maintainable as there was a violation of principle of natural justice which is a ground for permitting a writ petition to be maintainable in contractual matters. He relies upon the decision of Hon'ble Supreme Court in State of U.P. vs. Sudhir Kumar, **2020 SCC Online SC 847** in support of his arguments.

8. Mr. Dave submits that the learned Single Judge in paragraph No.110 of the impugned Order has held that the parties should resolve their disputes and enforce their respective rights in accordance with the Contract Act in appropriate civil proceedings before the appropriate court. He, therefore, submits that this finding of the learned Single Judge is binding upon the Respondents as they have not challenged the same, and therefore, the Respondents' attempt to impose its adjudication on the Appellant is wrong and illegal.

9. It is further submitted that the Respondents are blowing hot and cold at the same time as they acknowledge that commercial vehicles have been using free lanes to escape paying toll tax/ECC and at the same time, the Respondents were barred from collecting toll tax and penalty from such commercial vehicles.

10. Mr. Dave submits that the claims of the Appellant regarding the opening of Eastern and Western peripheral expressways has reduced traffic was rejected by the SDMC stating that the SDMC in the pre-bid query stage had stated that if there is any impact on traffic upon the opening of the said expressways the contractor can leave the project and go. He submits that this clause is *prima facie* illegal and non-enforceable as a contractor which leaves the project before completion of the terms is at risk of being blacklisted.

11. Mr. Dave further has brought to the notice of this Court two legal opinions given by Mr. Gourab Banerjee, Senior Advocate and Ms. Pinky Anand, learned ASG wherein they had advised the SDMC as far back as 22.10.2019 that opening of the Eastern and Western peripheral expressways will make major impact on the collection of toll tax/ECC being reduced. He

has diverted our attention to minutes of meeting of the High Level Committee held on 16.01.2019, the traffic survey report given by M/s Samarth Softech Solution Pvt. Ltd. and minutes of meeting dated 25.07.2019 convened by the Commissioner of SDMC with CMD of M/s MEPIDL. It is his submission that the SDMC had acknowledged that the opening of Eastern and Western peripheral expressways would adversely impact the collection of toll tax and ECC yet the Commissioner who is a party in the dispute acted as the Judge in the instant case and rejected the claims of the contractor vis-a-vis the opening of Eastern and Western peripheral expressways.

12. It is submitted by Mr. Dave that there is a huge public interest involved in the present dispute as the only reason for the Respondent's action against the Appellant is that they want to give the tender to Sahakar-JV at a throwaway price causing huge losses to the public exchequer. He further submits that the contract agreement between the Appellant and Respondent/Corporation has a public law element as the agreement was for collection of toll tax and ECC, and the bid document itself states that the collection of ECC does not form part of the contractual amount. He submits that the agreement empowers the Appellant to levy and collect taxes which is in the realm of public law.

13. *Per contra*, Mr. Sanjay Vashishtha, learned Standing Counsel for MCD, has submitted that the writ petition is not maintainable as it is a settled law that writ jurisdiction of a Court cannot be invoked in case of contractual disputes. He submits that in the present matter, the Appellant is raising complex questions of facts in a writ jurisdiction when he has an alternate remedy to file a suit or any other appropriate proceedings before a

civil court. He places reliance upon the decision of the Apex Court in Union of India and Ors. vs. Puna Hinda, (2021) 10 SCC 690. He has also placed reliance upon the decision of the Apex Court in State of Kerala and Ors. vs. MK Jose, (2015) 9 SCC 433 wherein the Hon'ble Supreme Court has deprecated the practice of High Court appointing Committees in contractual matters in exercise of its writ jurisdiction under Article 226 of the Constitution of India.

14. Mr. Vashishtha further submits that the refusal of the SDMC to unilaterally accept a third-party mediator or adjudicator be appointed to decide the dispute is an action of the body is an action which is of a private law character and in exercise of its contractual rights and cannot be tested on the anvil of Article 14 of the Constitution of India. He relies upon the decision of the Apex Court in LIC vs. Escorts, 1986 AIR SC 1370 to buttress his argument. He further submits that the judicial principles pertaining to the scope of judicial review in contractual matters are well settled and he places reliance upon a decision of this Bench in Verve Human Care Laboratories and Ors. vs. Union of India passed in W.P.(C) 3270/2022 in support of this argument.

15. It is submitted by Mr. Vashishtha that the Appellant has entered into the contract agreement with its eye open and is now seeking to modify its contractual obligations. He submits that the contract agreement had appropriate checks and balances for prospective bidder to take an informed decision before bidding for the tender. The contract agreement encapsulated various terms and conditions that provided the Appellant to carry out due diligence before making a bid for the tender and he has diverted our attention to Clause C sub-Clause 2.0 of the RFP titled "Responsibility of the

Bidder” and Clause 2.2 of the RFP titled “Summary-Existing Traffic & Revenue Features” in support. With regards to the opening of the Eastern and Western peripheral expressways, he submits that the contract agreement was amended by an Addendum dated 17.08.2017 allowing the contractor to surrender the contract. He further submits that as per Clause 3.9 (26) and Schedule 8.1 of the RFP, one of the General Obligations of the Contractor was to collect a penalty from specified commercial vehicles evading toll tax and he was allowed to do so as per the said clauses. He states that the Appellant has in fact collected penalty from such commercial vehicles and the Appellant has made a fallacious argument by stating the Respondent did not allow the Appellant to do so.

16. Mr. Vashishtha submits that the conduct of the Appellant is malafide and deserves no equitable relief from this Court. He states that as on 01.02.2023, the Appellant is in default of a huge amount of public funds of more Rs.5500 cores out of which the Appellant has not paid a single penny despite repeated notices and admissions. He argues that the Appellant has no intentions to make payment of the agreed amount to the corporation and such a defaulter cannot be granted any equitable relief from this Court. The Appellant has been in deliberate non-compliance of several orders, including Orders dated 26.11.2020, 02.03.2020, 20.03.2020 as well as the various demand notices issued by the Respondents upon the Appellant. As such, the defaulter is ineligible to bid for further contracts and the submission of the Appellant that it is ready to pay more than the successful bidder is a misleading submission.

17. Mr. Vashishtha further submits that as per the contract agreement, the fixed weekly amount irrespective of actual collections was payable to the

SDMC and no reduction was allowed in the weekly amount for any reason whatsoever. The claims of the Appellant regarding *force majeure*, reduction in traffic, evasion of toll tax by commercial vehicles using free lanes, COVID lockdown are untenable.

18. It is submitted by Mr. Vashishtha that the impugned Order is just and well-reasoned as the SDMC has acted within the four corners of the contract agreement and sought to exercise its right under the contract agreement to enforce the obligations imposed upon the Appellant. He submits that the learned Single Judge has correctly held that Article 226 of the Constitution of India cannot be invoked by the Appellant to wriggle out of its contractual obligations or modify the contractual terms or create a non-existing obligation on SDMC. The Appellants had failed to show the learned Single Judge that the Respondents had not acted fairly, justly and reasonably or that their action was arbitrary and in violation of Article 14 of the Constitution of India. He states that the appropriate remedy for the Appellant to decide its claims would be a civil suit before the appropriate Civil Court.

19. In rejoinder, Mr. Dave Submits that the submission of the Respondents that the Appellant is trying to modify the terms of the contract agreement is incorrect. He submits that Clauses 15 and 15.4 of the RFQ excuse the performance of the party when *force majeure* is pleaded. He states that the learned Single Judge has failed to take note of this argument and thus the impugned Order ought to be set aside on this ground alone.

20. Mr Dave further submits that the conduct of SDMC in seeking to remove the Appellant is vitiated by malice in fact as the termination of the Appellant was done illegally by the Respondents *vide* Order dated 16.03.2020. As the termination itself was bad, the Appellant could not have

been removed without following the procedure prescribed in the Contract Act.

21. Heard learned Counsel appearing for the Parties and perused the material on record.

22. The traditional view has always been that in contractual matters between the States and private parties, the Courts must not ordinarily exercise its jurisdiction under Article 226 of the Constitution of India. However, there has been a paradigm shift that when instrumentalities of the State act completely contrary to the parameters of Article 14 of the Constitution of India and the action of the State is arbitrary and discriminatory then the writ courts do interfere by exercising jurisdiction under Article 226 of the Constitution of India. The Apex Court in Shrilekha Vidyarthi (Kumari) v. State of U.P.,(1991) 1 SCC 212 has held as under:

"22. There is an obvious difference in the contracts between private parties and contracts to which the State is a party. Private parties are concerned only with their personal interest whereas the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that 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. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that

the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

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24. The State cannot be attributed the split personality of Dr Jekyll and Mr Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfil the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no

reason why the requirement of Article 14 should not extend even in the sphere of contractual matters for regulating the conduct of the State activity.

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27. Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14.

28. Even assuming that it is necessary to import the concept of presence of some public element in a State action to attract Article 14 and permit judicial review, we have no hesitation in saying that the ultimate impact of all actions of the State or a public body being undoubtedly on public interest, the requisite public

element for this purpose is present also in contractual matters. We, therefore, find it difficult and unrealistic to exclude the State actions in contractual matters, after the contract has been made, from the purview of judicial review to test its validity on the anvil of Article 14.

23. The abovementioned Judgment has been followed in a number of Judgments and the most recent one is M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd., (2023) 2 SCC 703.

24. But at the same time, it is also trite law that the award of contract whether by a State or by a private party is essentially commercial transaction having its own terms. The tender is an invitation to offer and if a person is interested in participating in the tender, the person, after scrutinizing all the requirements of the tender, gives his willingness to participate in the tender by bidding in the tender which is a term of an offer and the State accepts the best bidder which results in a contract. The person who bids in the tender and makes an offer with open eyes is aware of the obligations to be performed under the contract. After participating in the tender and after being a successful bidder, it is not open for the person who is the successful bidder to then turn around and state that the clauses were unfair or have become unworkable. If there are clauses in the tender to resolve the disputes then the parties are normally expected to invoke those clauses which in the common parlance are called as dispute resolution clauses. It is not uncommon that in executory contracts, there is an element of uncertainty and there can be events which can make the contract not viable. There may or may not be clauses in the contract which provides for warranty/guarantee in such terms. The person, who bids in the contract, has to take into account

the risks that can occur in future and resort to available remedies under the contract itself. The parties can sit on a table for negotiation and may go for a novation of contract. If such discussion fails, then the parties have to invoke such remedies available under the contract and prove their case by leading oral and documentary evidence.

25. It is pertinent to mention here that in the present case, there is a Dispute Resolution Mechanism under Clause 16 of the RFP which reads as under:

"Dispute Resolution

16.1 Except where otherwise provided in the agreement, all questions and disputes in any way arising out of or relating to the agreement shall be dealt with as mentioned below.

16.2 In the event the Contractor consider any work demanded of it as being outside the requirement of the Agreement, or disputes any record or decision given in writing by the Competent officer in any matter in connection with or arising out of the Agreement, to be unacceptable, it shall promptly within (15) days request the Competent Officer in writing to give his instructions or decision I in respect of the same. Thereupon, the competent Officer shall give his written instruction or decision within a period of (30) days for the receipt of the Contractor's Letter.

16.3 If the Competent Officer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the Competent Officer, the Contractor may, within (15) days of receipt of Competent Officer's instruction or decision, appeal to the Commissioner, SDMC who shall afford an

opportunity to the Contractor to be heard, if the later so desires, and to offer evidence in support of its appeal. The Commissioner, SDMC shall give his decision in writing within (30) days of receipt of Contractor's appeal which shall be acceptable to the Contractor."

26. In accordance with the Dispute Resolution Clause, the dispute between the parties was decided by the Competent Officer appointed and an Order dated 31.01.2020 was passed, rejecting the claims of the Appellant. The Appellant claims that the Competent Officer was not an independent adjudicator, and therefore, the decision-making process is faulty and flawed.

27. In the opinion of this Court, the learned Single Judge has rightly held that in the case of contracts entered into between the State and an individual/entity pursuant to floating of tenders, the mutual rights and liabilities of the parties are governed by the terms of the contracts and the laws relating to the contracts. There is no compulsion on anyone to enter into these contracts and it is voluntary on both sides. There can be no question of the State power being involved in such contracts. The State does not guarantee profit to the licensees in such contracts and there is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is not concern of the State[Refer to: Excise Commr. v. Issac Peter, (1994) 4 SCC 104]

28. Coming to the facts of the present case, Clause 3 of the request for proposal deals with acknowledgments. Clause 3(b) and 3(e) of the same reads as under:

"3(b) The Contractor hereby acknowledges and agrees that it has been, allowed adequate access to the Site and the Contract Facilities for inspection and

review, has had sufficient time to thoroughly review the Offer Documents and has carried out its own independent investigations of the Site, its surroundings and the Contract Facilities before the Effective Date and has made its own assessment as to the existing physical conditions of the Site and its surroundings and the Contract Facilities.

3(e) The Contractor agrees and confirms that it shall not be entitled to any compensation rebate or reduction in Toll Collection Contract Fee on account of change or variation in traffic pattern, volume or intensity for any reason whatsoever other than as specifically permitted in accordance with this Agreement."

29. A perusal of the abovementioned Clauses 3(b) and 3(e) indicates that the Appellant has been allowed adequate access to the Site and the Contract facilitates for inspection and review of the site and that the Appellant will not be entitled to any compensation rebate or reduction in Toll Collection Contract Fee on account of change or variation in traffic pattern, volume or intensity for any reason.

30. The agreement entered into between the parties also provides that the Appellant had agreed that the request for proposal is a part of contract and the terms of request for proposal shall govern the relationship between the Appellant and the Respondents herein.

31. The material on record also indicates that before the bidding took place, the Appellant had also raised queries regarding the peripheral roads which were under construction. Query No.11 and answer to the same reads as under:

<i>SL No.</i>	<i>Queries</i>	<i>Replies</i>
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11	<i>As per Central Government (Ministry of Road & Highways and NHAI) notified deadlines for opening during 2018-19 of Two peripheral Road Delhi avoiding Roads to decongest Delhi (Eastern Expressway passing through states of UP & Haryana and Western Expressway Kundli - Manesar - Palwal), commercial vehicles is bound to decrease by at least 25-30%, what suitable compensation will be given to MCD Toll Contractor on account of reduction in traffic volume for this Negative Growth during remaining tenure as reserve price is fixed on present traffic volume and future growth for next 3 years as additional high ECC charges on both empty and loaded trucks will discourage heavy vehicles passing through Delhi as alternate routes will be available and will be cheaper.</i>	<i>The question is hypothetical. However a new clause regarding 'surrender of contract' has been introduced in RFP documents vide Addendum-I</i>
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32. The question regarding loss of revenue to Appellant on account of opening of the peripheral expressways had also been raised before the High-Level Committee which was constituted to consider the claims of the Appellant. In fact, Claim No.4 was raised to consider the loss that has occurred due to the diversion of traffic at the Eastern and Western Peripheral Expressways from June 2018 to June 2019. The High-Level Committee, after considering the material before it, held that the claim cannot be covered under Clause 15.2 which deals with force majeure since it is not a force majeure event. The High-Level Committee also placed reliance upon Clause 3(e) under which the Appellant had agreed and confirmed that it would not be entitled to any compensation rebate or reduction in Toll Collection Contract Fee on account of change or variation in traffic pattern, volume or intensity for any reason whatsoever. The High-Level Committee had also taken note of the fact that in the pre-bid meeting, the query was raised and

answered and despite that the Appellant had placed the bids with its open eyes.

33. It is a matter of common knowledge and common prudence that the Eastern and Western Peripheral Expressways project has been in consideration before the request for proposal was brought out and persons who were to bid for the contract knew of the impact on the volume of traffic into Delhi, the opening of the expressways would have. It is, therefore, not appropriate for the Appellant to state that a subsequent event has reduced the traffic on the roads leading to decrease in revenue. It is not open for the Appellant to expect that the State would show indulgence by reducing the amount payable.

34. The Respondent/SDMC had also added an addendum dated 17.08.2017 in the contract agreement which allowed the Appellant to surrender the agreement if it wishes to do so on account of opening of Eastern and Western Peripheral Expressways.

35. The RFP also provides for instructions to applicants/bidders wherein Clause C sub-Clause 2.0 provides that prior to submission of the bid, the applicants/bidders were advised to visit and examine the toll collection point and their surroundings to obtain and ascertain for themselves all technical data, demands or any other information necessary for preparing their proposal. The said Clause also provides that the bidders shall be deemed to have full knowledge of the site conditions whether physically inspected or not. The RFP further provides that in Clause 2.2 titled "Summary Existing Traffic and Revenue Features" that prospective bidders must conduct their individual and separate site inventories and traffic services as deemed

necessary to verify the traffic volume. As such the Appellant cannot claim that it did not have knowledge of the toll sites and the traffic inflow.

36. Clause 3.3 of the RFP titled "Guidelines for Toll Collection" provides for provisions/arrangements to be made for collection of toll tax at defunct Rajokari Gurgaon Toll Plaza (NH-8). It provides that it is the contractor which has to make arrangements for diversion of specified commercial vehicles towards toll links to collect toll tax from such vehicles and it is the duty of the applicant to ensure that such specific commercial vehicles pay toll tax. It provides that traffic calming measures have been installed to enable the toll tax contractor to stop and divert the specified commercial vehicles towards the toll links with the help of wheeled/rolling barriers and marshals which are to be arranged by the selected bidder.

37. The RFP further provides in Clause 3.9 for General Guidelines and Parameters for the selected bidder. Sub-Clause 26 of Clause 3.9 provides that the selected bidder at its own costs and expenses is responsible for charging a penalty from such specified commercial vehicles which are evading toll tax in accordance with Section 9 of Toll Tax Bye-Laws, 2007 which authorizes Delhi Municipal Corporation to punish those vehicles by charging penalty equal to five times the amount of basic rate per entry prescribed for such vehicles provided that the amount of penalty for one such violation does not exceed Rs.500. Schedule 8.1 of the RFP provides General Obligations of the Contractor which includes the obligation of the contractor to charge penalty from toll tax evading commercial vehicles entering Delhi. It further provides that the selected bidder is also authorize to charge the penalty from such specified commercial vehicles which are evading payment of ECC in terms of Delhi Government Notification dated

26.04.2016. The Appellant, therefore, cannot claim that the Respondents did not permit or provide adequate authorization or personnel to the Appellant to charge penalty from such specified commercial vehicles which are evading toll tax and ECC by using free lanes.

38. In view of the foregoing, this Court is of the opinion that the view taken by the learned Single Judge not to entertain the writ petition under Article 226 of the Constitution of India does not require any interference, more so in view of the assertions and rebuttal of both the parties. The dispute between the parties cannot be adjudicated only on the basis of affidavits. The issues raised can be adjudicated only by leading evidence before an appropriate forum and a writ court is not the appropriate forum for the same.

39. It is well settled that the existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a writ petition in a contractual matter. Again, the question as to whether the writ petitioner must be told off at the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, the resolution of which is necessary as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the writ court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit. The Apex Court in M.P. Power Management Co. Ltd. v. Sky Power Southeast Solar India (P) Ltd., (2023) 2 SCC 703 has addressed this aspect as under:

“82.7. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a writ petition in a contractual matter. Again, the question as to whether the writ petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief sought. Undoubtedly, while there is no prohibition, in the writ court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.”

40. The learned Single Judge, after considering the facts and circumstances of the case and the objections raised by the Respondents, has rightly held that the Appellant cannot invoke the extraordinary jurisdiction under Article 226 of the Constitution of India and the same does not warrant any interference by this Court.

41. The appeal is dismissed, along with pending application(s), if any.

SATISH CHANDRA SHARMA, C.J.

SUBRAMONIUM PRASAD, J

APRIL 10, 2023

S. Zakir/Arsh