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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 04.08.2023

+ W.P.(C) 10308/2023, CM APPL. 39862/2023 & CM APPL. 39863/2023

MS GREENTECH ENVIRON MANAGEMENT PVT LTD MS
HP Petitioner

Through: Mr. Kumar Anurag Singh and Mr.
Zain A. Khan, Advocates.

versus

MUNICIPAL CORPORATION OF DELHI & ORS.

..... Respondents

Through: Mr. Sanjay Vashishtha, SC for
MCD with Mr. Vishal Kumar,
Advocate.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J (Oral)

1. The petitioner was awarded a contract by the respondent-Municipal Corporation of Delhi ["MCD"] under a Letter of Award dated 03.11.2022 ["the Contract"] for disposal of 30 Lakh mega tonnes of legacy waste by bio-remediation and bio-mining at the Okhla dumpsite, Delhi. Under the Contract, the petitioner was required to segregate inert material from the dumpsite and supply that to the National Highways Authority of India ["NHAI"] after due processing.

2. The petitioner's grievance is that a penalty of approximately Rs.8.5 crores has been imposed upon it purportedly, under Clause 7.4.7 of the

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Contract, on the ground that inert material had been transported with unprocessed material, leading to an allegation of inefficient quality control mechanism at the site.

3. The petitioner made a representation to the Commissioner, MCD on 06.07.2023 against this decision (styled as an “appeal”). The Executive Engineer (SLF), Okhla disposed of the said representation on 31.07.2023, holding that the levy is covered by Clause 7.4.7 of the Contract, that the quality of the material has not been surveyed by NHAI’s Engineers, and that the responsibility for quality control lies upon the petitioner.

4. In the meantime, on 07.06.2023, MCD issued a Request for Proposal [“RFP”] for a similar project of disposal of legacy waste at the Ghazipur dumpsite. By way of an addendum dated 03.07.2023, it was provided in the said RFP that the performance of agencies working at the three existing dump sites of MCD (including the question of any penalty levied upon them) would be considered by the Technical Evaluation Committee before considering them as “technically qualified bidders”. The aforesaid corrigendum to the RFP was challenged by the petitioner in W.P.(C) 9487/2023, which was disposed of on 19.07.2023, permitting the petitioner to withdraw the petition with liberty to file a fresh writ petition in case the need arises in the future. The challenge in the present petition is not with regard to any order passed by MCD deciding the question of the petitioner’s eligibility for the RFP dated 07.06.2022. Learned counsel for the MCD states that the Technical Evaluation of that RFP is still ongoing, in which the petitioner has participated, and no final decision has yet been taken on the petitioner’s eligibility.

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5. The question then remains of the relief sought in this petition, which concerns the levy of penalty in respect of the Agreement dated 07.11.2022 [“the Agreement”]. As far as this aspect is concerned, having heard learned counsel for the parties, I am of the view that the issue may appropriately be adjudicated in duly constituted civil proceedings, rather than by way of a writ petition.

6. The judgments of the Supreme Court and this Court make it clear that the writ Court will not normally entertain a petition with regard to contractual disputes, particularly if there are disputed questions of fact. Although there is no absolute bar on adjudication of contractual disputes in a writ petition, the circumstances in which such a writ petition can be entertained have been elucidated by the Supreme Court, *inter alia*, in the judgment in *Joshi Technologies International Inc. vs. Union of India*¹, relied upon by learned counsel for the MCD as follows:

“69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

¹ (2015) 7 SCC 728.



69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

69.4. Money claims per se particularly arising out of contractual obligations are normally not to be entertained except in exceptional circumstances.

70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

70.1. At the stage of entering into a contract, the State acts purely in its executive capacity and is bound by the obligations of fairness.

70.2. State in its executive capacity, even in the contractual field, is under obligation to act fairly and cannot practise some discriminations.

70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. **If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.**

70.4. Writ jurisdiction of the High Court under Article 226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

70.5. Writ petition was not maintainable to avoid contractual obligation. Occurrence of commercial difficulty, inconvenience or hardship in performance of the conditions agreed to in the contract can provide no justification in not complying with the terms of contract which the parties had accepted with open eyes. It cannot ever be that a licensee can work out the licence if he finds it profitable to do so: and he can challenge the conditions under which he agreed to take the licence, if he finds it commercially inexpedient to conduct his business.

70.6. Ordinarily, where a breach of contract is complained of, the party complaining of such breach may sue for specific performance of the contract, if contract is capable of being specifically performed. Otherwise, the party may sue for damages.

70.7. Writ can be issued where there is executive action unsupported by law or even in respect of a corporation there is denial of equality

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before law or equal protection of law or if it can be shown that action of the public authorities was without giving any hearing and violation of principles of natural justice after holding that action could not have been taken without observing principles of natural justice.

70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.

70.9. The distinction between public law and private law element in the contract with the State is getting blurred. However, it has not been totally obliterated and where the matter falls purely in private field of contract, this Court has maintained the position that writ petition is not maintainable. The dichotomy between public law and private law rights and remedies would depend on the factual matrix of each case and the distinction between the public law remedies and private law field, cannot be demarcated with precision. In fact, each case has to be examined, on its facts whether the contractual relations between the parties bear insignia of public element. Once on the facts of a particular case it is found that nature of the activity or controversy involves public law element, then the matter can be examined by the High Court in writ petitions under Article 226 of the Constitution of India to see whether action of the State and/or instrumentality or agency of the State is fair, just and equitable or that relevant factors are taken into consideration and irrelevant factors have not gone into the decision-making process or that the decision is not arbitrary.

70.10. Mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirements of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness.

70.11. 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.

71. Keeping in mind the aforesaid principles and after considering the arguments of the respective parties, we are of the view that on the facts of the present case, it is not a fit case where the High Court should have exercised discretionary jurisdiction under Article 226 of the

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Constitution. First, the matter is in the realm of pure contract. It is not a case where any statutory contract is awarded.”²

6. In *Union of India vs. Puna Hinda*³ also, the Supreme Court has crystalised relatively narrow grounds in which petitions under Article 226 of the Constitution would be the appropriate remedy in a contractual matter, *inter alia*, in the following terms:

*“24. Therefore, the dispute could not be raised by way of a writ petition on the disputed questions of fact. **Though, the jurisdiction of the High Court is wide but in respect of pure contractual matters in the field of private law, having no statutory flavour, are better adjudicated upon by the forum agreed to by the parties. The dispute as to whether the amount is payable or not and/or how much amount is payable are disputed questions of facts. There is no admission on the part of the appellants to infer that the amount stands crystallised.** Therefore, in the absence of any acceptance of joint survey report by the competent authority, no right would accrue to the writ petitioner only because measurements cannot be undertaken after passage of time. Maybe, the resurvey cannot take place but the measurement books of the work executed from time to time would form a reasonable basis for assessing the amount due and payable to the writ petitioner, but such process could be undertaken only by the agreed forum i.e. arbitration and not by the writ court as it does not have the expertise in respect of measurements or construction of roads.”⁴*

7. A recent decision of a Division Bench of this Court in *MEP Infrastructure Developers Ltd. vs. South Delhi Municipal Corporation and Ors.*⁵ has formulated the principles thus:

*“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.***

² Emphasis supplied.

³ (2021) 10 SCC 690.

⁴ Emphasis supplied.

⁵ 2023 SCC OnLine Del 2088.

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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....”⁶

8. In the present case, the issues which are disputed between the parties, do not merely concern the interpretation of the Agreement, but also factual disputes with regard to the quality of the inert material supplied by the petitioner to NHAI in terms of the Agreement. Upon enquiry as to whether the factual basis of the impugned letters is admitted, learned counsel for the petitioner candidly submits that these are, in fact, contested matters. However, he seeks to rely upon a communication dated 20.01.2023, of an independent agency appointed by NHAI (Annexure P-11 to the writ petition), wherein the agency had certified the summary of weighment for the quantity of material supplied by the petitioner to NHAI and found the same to be in order. I am unable to accept this contention as it appears, *prima-facie*, that the certification in question pertains to the quantity of material and not to its technical specifications. This is also the stand taken by MCD in the impugned communication dated 31.07.2022. In any event, I am of the view that a dispute of this nature cannot be conclusively determined on the basis of a single document relied upon by the petitioner but would require an

⁶ Emphasis supplied.



evidentiary assessment based upon the material produced by each of the parties.

9. For the aforesaid reasons, the writ petition, alongwith pending applications, is dismissed, with liberty to the petitioner to take such civil remedies as he may be entitled to in law.

10. It is made clear that in the event the petitioner is held ineligible to participate in the RPF dated 07.06.2023, the present order is not intended to prejudice the liberty granted to it by the Division Bench *vide* order dated 19.07.2023 in W.P.(C) 9487/2023.

PRATEEK JALAN, J

AUGUST 4, 2023

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