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

\+ W.P.(C) 12188/2023

M/S HIMALAYAN FLORA AND AROMAS PVT LTD .....Petitioner

Through: Mr. Jayant Mehta, Senior Advocate with Mr. Anand Mishra, Ms. Vandita Nain and Ms. Ayushi Rajput and Mr. Vikramaditya, Advocates

versus

MUNICIPAL CORPORATION OF DELHI .....Respondent

Through: Mr. Tushar Sannu, Standing Counsel with Mr. Amit Kumar Sharma, Additional Commissioner,

CORAM:
HON'BLE MR. JUSTICE PRATEEK JALAN

O R D E R

% **22.11.2024**

W.P.(C) 12188/2023 & CM APPL.67247/2024 (*application on behalf of the petitioner for directions*)

1. The petitioner has filed this writ petition against a decision dated 04.11.2022 taken by the Municipal Corporation of Delhi ["MCD"], in respect of a contract between the parties for display of advertisements through *four unipole cluster No. 7 on Expressway NH-24/9, FTC Nizamuddin to Ghaziabad* ["cluster"/"the site"].

2. MCD floated a tender notice for allotment of advertisement rights through designated clusters/individual unipole sites on the said highway,

on 24.09.2019. The term of the tender was three years, extendable by two terms of one year each. The monthly licence fee was subject to enhancement of 10% in the fourth year and a further 10% in the fifth year.

3. The petitioner participated in the tender and was allotted the aforesaid cluster. It deposited a sum of ₹ 22,89,600/- on 09.12.2019 towards advance monthly licence fee and security deposit, and was issued a final letter of allotment on 16.12.2019.

4. The petitioner's case is that it was unable to display advertisements, as contracted, in view of objections of the National Highways Authority of India ["NHAI"]. NHAI finally issued a No Objection Certificate ["NOC"] on 24.03.2022, after which the petitioner sought an authority letter for execution of work for installation of the unipoles. It is in this context, that MCD issued a letter dated 04.11.2022, which approved the allotment of the contract to the petitioner "*for the remaining period only*" on escalation of monthly licence fee @10%.

5. Mr. Jayant Mehta, learned Senior Counsel for the petitioner, argues that MCD ought to have granted the petitioner permission for the entire contractual period, and not just the balance. He submits that the petitioner was unable to install the unipoles for more than two years, due to the objections of NHAI. It was, thus, deprived of its contractual entitlement for no fault of its own. He submits that, it was for MCD to ensure, prior to issuing a tender, that the site was available to the successful party without objections of NHAI.

6. Mr. Tushar Sannu, learned Standing Counsel for MCD, however, disputes this submission. He contends that MCD did have a NOC from

NHAI issued on 21.06.2019, which has been mentioned in the counter affidavit, and that MCD ought not to be held responsible for NHAI's conduct. While issuing notice in this petition on 15.09.2023, the Court also noted a preliminary objection raised by Mr. Sannu, that the disputes are contractual in nature, and should be adjudicated in arbitral proceedings.

7. The matter has thereafter been pending to enable the parties to try and resolve the matter mutually. By an order dated 25.10.2024, the submission of learned counsel was noted that negotiations were at an advanced stage and the petition was listed for hearing on 13.12.2024.

8. In the meanwhile, the petitioner has filed CM APPL. No. 67247/2024 seeking disposal of the petition on the basis of an offer dated 18.07.2024 received from MCD, which the petitioner claims to have accepted by a letter dated 21.10.2024. The said letter dated 18.07.2024 records that the petitioner should pay the monthly licence fee at the current market rate. A rate of monthly licence fee was quoted, based on the rate tender for cluster No. 3 which, according to MCD, was in the vicinity of the subject cluster. By the letter dated 21.10.2024, the offer contained in MCD's letter dated 18.07.2024 was accepted and clarification was sought to the effect that the tenure of the agreement would be for a period of five years as originally agreed, w.e.f. 04.11.2022, and that the escalation clause would be on similar terms as in the original documents.

9. In the course of hearing on the application, however, it appears that MCD no longer intends to proceed on the basis of the offer it had made on 18.07.2024, although no such decision has yet been communicated to

the petitioner. The matter was taken up for hearing on several dates, on various applications filed, but the Court was not apprised of any further decision in this regard. On 25.10.2024, as noted above, the Court was informed that negotiations are at an advanced stage.

10. The record has been produced before the Court, from which it appears that MCD's position has thereafter undergone a complete about-turn.

11. Mr. Sannu has now been instructed that MCD has taken a decision not to accept the petitioner's request dated 21.10.2024. This, in fact, appears to be a misconceived understanding, as the said letter was, in fact, an acceptance of MCD's own offer dated 18.07.2024, and not an independent request. Mr. Sannu submits that the response dated 21.10.2024 was belated by three months after the letter dated 18.07.2024, for which reason it has been rejected. However, he is unable to point out any communication to the petitioner with regard to the period within which the offer was to be accepted. The recording in the order dated 25.10.2024 is also inconsistent with this position.

12. Be that as it may, factually, the position is that MCD declines, at this stage, to enter into any settlement, as offered in its letter dated 18.07.2024. Whatever the merits of that decision, the disputes arise out of a commercial contractual arrangement and I am of the view that it is inappropriate, in writ proceedings, to direct enforcement of the settlement.

13. On the merits of the matter, the original licence period was five years, commencing in the year 2019 which would, in any event, come to an end on 15.12.2024.

14. The case of MCD, in the counter affidavit, other than the contention on maintainability, is on two points. It has been argued that the "*decision of the Competent Authority*", being the Commissioner of MCD, or an officer authorised by him, would be final and binding on the parties. As articulated in the preliminary objections taken by MCD itself, the contract contains an arbitration clause, which does not reserve any matters as inarbitrable. Reliance upon Clause 38 must, therefore, be subject to the contractual rights of the parties.

15. The substantive issue, on facts, urged in the counter affidavit, is that MCD, in fact, made an effort to ensure that NHAI issued the NOC in time, and is not liable *qua* the delay occasioned by the action of NHAI.

16. Having regard to this aspect, Mr. Mehta submits that the petitioner will institute appropriate proceedings for adjudication of its contractual claims, and also reserves its rights to seek interim measures of protection under Section 9 or Section 17 of the Arbitration & Conciliation Act, 1996, as it may be advised.

17. It may be noted that Mr. Sannu has submitted that MCD's decision not to follow through on its offer dated 18.07.2024 is based upon the potential financial upside of a fresh tender and auction process. Mr. Mehta points out in the course of hearing, that such a tender has in fact been issued on 20.11.2024, after the filing of CM APPL. 67247/2024, and after the last date of hearing before this Court. The tender includes the cluster in question, for which a reserve price has been fixed, which is lower than the price offered in MCD's letter dated 18.07.2024, and accepted by the petitioner. Mr. Mehta, therefore, seeks an interim protection, to the extent that the tender for this site, be not awarded to any

other party, for a limited period, to enable the petitioner to seek its contractual remedy.

18. Mr. Sannu opposes such a plea, and states that MCD has recorded on the file and in the minutes of meeting of the Tender Committee, that the tender with respect to the cluster in question would be subject to orders of the Court.

19. Curiously, however, no such statement has been included in the tender notice published by MCD on its website. Potential bidders, therefore, have no awareness of these conditions.

20. In these circumstances, while leaving it open to the petitioner to invoke appropriate remedies, including applications for interim measures for protection as stated above, MCD is directed to publish, with the same prominence as the tender notice issued on 20.11.2024, that the tender with respect to this cluster is subject to orders that may be passed by the Court or in arbitral proceedings. In the event any tender is proposed to be awarded for this purpose, such a condition will also be incorporated in the documents issued to the successful bidder. It must be made clear to bidders, that the tender in respect of this site is liable to be cancelled, if so directed by interim or final orders of the competent Court or arbitral tribunal.

21. Mr. Sannu states that no further interim protection is required, as the last date of the present tender is 15.12.2024, and the petitioner will not be dispossessed before that date.

22. The writ petition, alongwith the pending application, is disposed of with these directions. The next date of hearing, i.e., 13.12.2024 stands cancelled.

23. The rights and contentions of the parties in the proceedings to be instituted pursuant to the directions given hereinabove remain reserved.

24. It is also made clear that the petitioner may participate in the ongoing tender without prejudice to its rights and contentions.

PRATEEK JALAN, J

NOVEMBER 22, 2024
'SV'/AL/