

(2019) 11 DEL CK 0336

In the Delhi High Court

Case No : Civil Writ Petition No. 12483 Of 2019

MEP Infrastructure Developers Ltd

APPELLANT

Vs

Sdmc And Ors

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Delhi Municipal Corporation Act, 1957 — Section 18F, 113(2)(g)

Citation : (2020) 1 AD(Delhi) 439

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Dr. Abhishek Manu Singhvi, Mukul Rohatgi, Sachin Datta, Rajiv Shankar Dvivedi, Roahn Jaitley, Shushant Sarkar, Akshay Sharma, Gaurab Banerji, Harsha Peechara, Raka Chatterjee, S.P. Mukherjee, Ishita Mishra , Mohit Pandey

Final Decision : Disposed Of

Judgement

Jayant Nath, J

CM APPL. No. 50934/2019

Allowed, subject to all just exceptions.

W.P.(C) 12483/2019 and CM APPL. No.50933/2019

1. This writ petition is filed seeking the following reliefs:-

"a. 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. I more than the actual amount collected towards toll tax from commercial vehicles entering the NCT, Delhi;

b. Issue a writ in the nature of declaration, declaring that the Toll Tax & ECC Agreement is ultra vires Section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 to the extent it contemplates payment of amount by the petitioner to the respondent no. I in excess of the toll tax actually collected by the petitioner;

c. 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 re-determine the annual/ weekly amount payable by the petitioner to the SDMC towards toll tax;

d. 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 tax paying commercial vehicles and taking into account the tax leakages on account of free lanes;

e. Issue a writ in the nature of certiorari quashing the demand notice dated 18.11.2019 issued by the respondent to the petitioner for payment of Rs. 450.6973 crores.

f. Issue a writ in the nature of certiorari quashing the demand of .1 % per day that is 36.5% per annum in the demand letter dated 18/11/2019 as being in terrorem and inequitable.

g. Issue a writ in the nature of Mandamus directing the SDMC to provide a suitable mechanism for resolution of disputes/grievances of the petitioner as the mechanism provided by the contract has become unworkable."

2. The case of the petitioner is that for the purpose of collecting Toll Tax, SDMC floated a tender on 21.07.2017 inviting bids from interested parties to collect Toll Tax and ECC from specified commercial vehicles at 124 toll plaza/post/barriers location bordering Delhi.

3. The petitioners made a bid and were declared successful. An agreement was signed between the petitioner and respondent No. 2 on 28.09.2017. As per the agreed terms, the petitioner agreed to pay to the respondent a sum of Rs. 23.12 crores per week being a total of Rs. 1206 crores per annum for the period of five years subject to enhancement of 5% in the awarded amount after completion of every two years. Presently, it is stated that as per the agreement, the petitioner are obliged to pay Rs.24.28 crores per week.

4. The grievance of the petitioner is that the Eastern Peripheral Expressway was opened for general public traffic on 27.05.2018. On 16.01.2019, a meeting of a High Level Committee of the respondent took place. In the said meeting, they deliberated that the traffic entering Delhi has reduced due to opening of the Eastern peripheral Expressway. It was estimated in the meeting that was held on 31.08.2018 amongst SDMC, NHAI and the petitioner that on opening of the Eastern Peripheral Expressway there is a reduction of 30% in the commercial traffic approximately and it would be higher on the completion of the Western Peripheral Expressway. The grievance of the petitioner is that at present weekly expected revenue from 124 entry points is only Rs.19.25 crores taking into consideration all other aspects. On the annual basis collection of amount

calculated on the basis of survey report is approximately Rs.1000crores which is far below the awarded contract of Rs.1206 crores per annum.

5. It is the case of the petitioner that they have been regularly sending representations to the respondent with regard to decline in toll revenue due to diversion of traffic from 01.06.2018. On the representation of the petitioner, a High Level Committee was constituted to look into all the aforesaid claims as raised by the petitioner. The committee on 17.10.2019 is said to have made a recommendation and approved that a sum of Rs. 18,98,54,798/- be reduced from the outstanding claim made by the respondent of Rs.446,46,55,359/-.

6. On 18.11.2019, the respondent has issued a demand notice to the petitioner asking them to deposit a sum of Rs. 450.69 crores and the penalty amount of .1% per day i.e. 36.5% per annum within a period of seven days failing which action shall be taken for revocation of the bank guarantee and post dated cheques.

7. Learned senior counsel for the petitioner has vehemently urged as follows:-

(i) He has urged that as is apparent from the minutes of the meeting noted above, there has been a reduction of at least 30% in the traffic on the opening of the Eastern peripheral Expressway. This has further reduced on the opening of the Western Peripheral Expressway. Hence, he submits that the petitioner cannot be made to pay toll tax which they have not been collecting and will not be able to collect given the volume of traffic that is passing through various toll booths.

(ii) It is further pleaded that on 04.06.2018, a direction was issued by the respondent not to collect toll tax and ECC from other than the allotted six lanes. It is stated that this itself is causing a loss of Rs.36.81 lakhs per day.

(iii) It is further pleaded that Clause 16 of the agreement between the parties stipulates a dispute resolution clause. Under the said clause, in case any disputes are stated, decision has to be given by a competent officer in connection with or arising out of the agreement. If the competent officer fails to give his instructions or decision in writing or if the contractor is dissatisfied with the instructions of the competent officer, an appeal to the Commissioner, SDMC shall lie who shall give an opportunity to the contractor to be heard, if the later so desires. The Commissioner, SDMC shall give his decision in writing within 30 days on receipt of the contractor's appeal. It further pleaded that the respondent before raising a demand of Rs. 450 crores ought to have followed the principles of natural justice.

8. Learned senior counsel for the respondent has pleaded as follows:-

(i) He submits that the floor price of the bid was Rs.636 crores but the petitioner themselves made a bid of Rs. 1206 crores per annum. The second highest bid was of the bidder whose bid was at Rs. 811 crores. Meaning thereby, the petitioner themselves had made a much higher bid in an effort to grab the contract in question.

(ii) He further submits that in case toll tax is collected is higher than the petitioner's bid offer, the balance would be retained by the petitioner with themselves and would not be handed over to the respondent. Hence, he states that it was for the petitioner to have properly judged the possible revenue collection and made a bid accordingly.

(iii) He further states that presently, a total amount of Rs.450 crores is outstanding whereas the respondent have only a bank guarantee of Rs. 64 crores and some post dated cheques as a security.

9. Given the nature of submissions made, this writ petition can be disposed of at this stage.

10. I may note that the dispute resolution clause in the agreement between the parties reads as follows:

"16. Dispute Resolution Clause:-

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 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."

11. It is manifest from the above that a procedure has been incorporated in the Agreement whereby in case any contractor, namely, the petitioner has any dispute or any grievance, he can approach a competent officer/the Commissioner, SDMC who has to after giving a hearing pass a reasoned order.

12. In my opinion, it would be in the interest of justice that before the respondent enforces their demand as now claimed by demand dated 18.11.2019, first they should give a hearing to the petitioner and thereafter taking into account the submissions of the petitioner pass an appropriate reasoned order.

13. Reference may be had to the judgment of the Supreme Court in the case of *Swadeshi Cotton Mills vs. Union of India*, (1981) 1 SCC 664 where the court held as follows:-

"32. The maxim *audi alteram partem* has many facets. Two of them are: (a) notice of the case to be met; and (b) opportunity to explain. This rule is universally respected and duty to afford a fair hearing in Lord Lore-burn's oft-quoted language, is "a duty lying upon everyone who decides something", in the exercise of legal power. The rule cannot be sacrificed at the altar of administrative convenience or celerity; for, "convenience and justice" - as Lord Atkin felicitously put it - "are often not on speaking terms [*General Medical Council v. Spackman*, 1943 AC 627, 638]".

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94. The further question to be considered is: What is the effect of the non-observance of this fundamental principle of fair play? Does the non-observance of the *audi alteram partem* rule, which in the quest of justice under the rule of law, has been considered universally and most spontaneously acceptable principle, render an administrative decision having civil consequences, void or voidable? In England, the outfall from the watershed decision, *Ridge v. Baldwin* [1964 AC 40 : (1963) 2 All ER 66 (HL)] brought with it a rash of conflicting opinion on this point. The majority of the House of Lords in *Ridge v. Baldwin* [(1978) 1 SCC 248] held that the non-observance of this principle, had rendered the dismissal of the Chief Constable void. The rationale of the majority view is that where there is a duty to act fairly, just like the duty to act reasonably, it has to be enforced as an implied statutory requirement, so that failure to observe it means that the administrative act or decision was outside the statutory power, unjustified by law, and therefore *ultra vires* and void (see *Wade's Administrative Law*, *ibid.*, p. 448). In India, this Court has consistently taken the view that a quasi-judicial or administrative decision rendered in violation of the *audi alteram partem* rule, wherever it can be read as an implied requirement of the law, is null and void (e.g. *Maneka Gandhi case* [1964 AC 40 : (1963) 2 All ER 66 (HL)] and *S.L. Kapoor v. Jagmohan* [(1970) 2 WLR 1009 : (1970) 2 All ER 528 (CA)]). In the facts and circumstances of the instant case, there has been a non-compliance with such implied requirement of the *audi alteram partem* rule of natural justice at the pre-decisional stage. The impugned order therefore, could be struck down as invalid on that score alone. But we refrain from doing so, because the learned Solicitor-General in all fairness, has both orally and in his written submissions dated August 28, 1979, committed himself to the position that under Section 18-F, the Central Government in exercise of its curial functions, is bound to give the affected owner of the undertaking taken-over, a "full and effective hearing on all aspects touching the validity and/or correctness of the order and/or action/of take over", within a reasonable time after the take over. The learned Solicitor-General has assured the court that such a hearing will be afforded to the appellant Company if it approaches the Central Government

for cancellation of the impugned order. It is pointed out that this was the conceded position in the High Court that the aggrieved owner of the undertaking had a right to such a hearing."

14. Given the terms of the contract as noted above i.e. Clause 16 and the legal position regarding compliance of the principles of natural justice, it is appropriate that the respondent give a proper hearing to the petitioner and thereafter pass a reasoned order. In the interest of justice I pass the following directions:-

(i) Present writ petition would be treated as a representation of the petitioner to the Commissioner, SDMC.

(ii) 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.

(iii) The Commissioner/Nominee of the Commissioner would thereafter pass a reasoned order. This exercise may be done within two months from today.

(iv) The Commissioner/nominee of the Commissioner is requested to pass a reasoned order uninfluenced by any observations that have been made by this court while passing this order. Once the order is passed, the respondent is free to take steps as per law. Needless to add, in case the petitioner are not satisfied with the said order, they are at liberty to take steps to challenge the same as per law.

(v) In the meantime, the petitioner shall continue to pay a sum of Rs.20crores per week starting from the current week. In case there are two consecutive defaults in making payment, the right of the petitioner to a hearing and reasoned order shall stand superseded.

(vi) Demand notice dated 18.11.2019 is kept in abeyance subject to speaking order passed by the Commissioner/Nominee of the Commissioner.

15. It has been pointed out that certain post dated cheques that were given by the petitioner are expiring in the next two months. The petitioner will ensure that fresh post dated cheques are given to the respondent with the same validity as was given earlier.

16. This order has been passed without prejudice to the rights and contentions of the parties.

17. With the above, the present petition stands disposed of. Pending application also stands disposed of.