

(2021) 04 DEL CK 0067

In the Delhi High Court

Case No : Civil Writ Petition No. 2241 Of 2020, Civil Miscellaneous Application
No. 7822, 11092 Of 2020, 6420, 7038 Of 2021

Mep Infrastructure Developers Ltd.

APPELLANT

Vs

South Delhi Municipal Corporation And Ors

RESPONDENT

Date of Decision : 09-04-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 226
Delhi Municipal Corporation Act, 1957 — Section 113(2)(g)

Citation : (2021) 04 DEL CK 0067

Hon'ble Judges : Sanjeev Sachdeva, J

Bench : Single Bench

Advocate : Dr. Abhishek Manu Singhvi, Mukul Rohatgi, Rajiv Nayyar, Shrinivas S. Bobde, Rajiv Shankar Dvivedi, Sushant Kumar Sarkar, Rishabh Jain, Azeem Samuel, Harish Salve, Sanjay Jain, Sanjay Poddar, Garima Prasad, Yuvraj Sharma, Nikita Srivastava, Astha Deep, Padma Priya

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J

1. Consequent to a bidding process, Petitioner was awarded a Contract by the South Delhi Municipal Corporation (hereinafter referred to the SDMC), for collection of Toll Tax & Environment Compensation Charge (ECC for short) from specified commercial Vehicles at the 124 toll plazas/posts/barriers bordering Delhi.

2. Petitioner has filed the subject Petition inter alia impugning, order dated 31.01.2020, passed by the Commissioner SDMC rejecting its representation; the demand notice dated 14.02.2020 issued by the Respondent Corporation demanding the weekly remittances envisaged by the Contract agreement along with penalty @ 0.1% per day; termination notice dated 16.03.2020; consequent notice inviting tender dated 28.04.2020 and the encashment of its bank guarantees.

3. Subject Writ Petition was filed on 19.02.2020. Petition was subsequently amended because of subsequent events.

PRAYERS IN THE WRIT PETITION

4. Petitioner by the amended Petition dated 18.05.2020 seeks 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 tax paying commercial vehicles and taking into account the tax leakages on account of free lanes;

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 by way 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."

FACTUAL MATRIX

5. On 21.7.2017 SDMC, floated a tender inviting offers/bids from interested parties to collect Toll tax & ECC from specified commercial vehicles at the 124 toll plaza/post/barriers location bordering Delhi.

6. Petitioner was declared the successful bidder and the proposal of the Petitioner was accepted through Letter of Intent dated 19.09.2017.

7. Petitioner had offered to pay a cumulative and lump sum weekly remittance of Rs.23.13 crores, totalling to Rs. 1,206 crores per annum for two years with effect from 01.10.2017 and thereafter to enhance the weekly amount to Rs. 24.29 Crores, i.e., Rs. 1,266 crores per annum with effect from 01.10.2019 after giving effect to 5% enhancement.

8. Toll Tax & ECC Collection Agreement (hereinafter referred to as the Contract Agreement) was signed between the Petitioner and the Respondent No. 2 on 28/09/2017. Apart from collection of Toll Tax, collection of ECC, levied under the direction of the Supreme Court of India, was also entrusted to the Petitioner.

9. As per the Contract Agreement, Petitioner was entitled to collect penalty from specified commercial vehicles evading toll tax by using free lanes.

10. Petitioner is alleged to have written several letters to the Respondent Corporation in respect of the leakage because of specified commercial vehicles using free lanes to escape payment of toll tax and the inability of Petitioner to deploy its officials on the free lanes to collect toll tax and penalty.

11. The Eastern peripheral Expressway was opened for general public traffic with effect from 27.05.2018.

12. On 04.06.2018 Respondent No. 1 issued a letter to the Petitioner instructing it not to collect Toll & ECC from other than the allotted 06 lanes and directing Petitioner to maintain the flow of traffic and to avoid unnecessary traffic jam and segregate commercial traffic from diversion point.

13. Because of a strike called by the All India Motor Transport Congress, Petitioner by its letter dated 23.07.2018 claimed a set off of Rs 5.96 Crores from the toll tax payable by the Petitioner as a force majeure event as per the Contract Agreement.

14. In terms of the directions of a High-Level Committee of the Respondent corporation, a contract was awarded to M/s Samarth Softech Solutions Ltd. to carry out survey by conducting a seven-day long traffic count on a real-time basis to assess the probable reduction in entry of commercial traffic into Delhi, due to opening of Eastern peripheral Expressway and Western peripheral Expressway.

15. It is contended by the Petitioner that the traffic report submitted consequent to the survey revealed that the annual collection was Rs. 1,000 crores, which is far below the awarded contract of Rs. 1206 crores per annum.

16. It is alleged that a survey was conducted for a period of two weeks, at 11 locations, by Tescidel India Pvt. Ltd., to ascertain the data of commercial vehicles evading tax by moving through the free lanes.

17. As per the report, it is alleged that on a daily average 35,315 vehicles were evading the payment of tax through free lanes causing an estimated evasion of Rs. 36,81,900/- per day.

18. Petitioner is alleged to have raised claims on the Respondent Corporation towards the loss sustained on account of reduction in entry of commercial traffic into Delhi due to opening of Eastern peripheral Expressway and Western peripheral Expressway and the loss sustained due to vehicles evading tax payments by using free lanes.

19. A high-level committee was constituted to look into the claims raised by the Petitioners. The Committee recommended rejection of the claims to the extent of Rs. 446,46,55,339/- and approved claim to the extent of Rs. 18,98,54,798/-.

20. Pending consideration of the recommendations of the high-level committee, the Respondent on 18.11.2019, issued a demand notice upon the Petitioner asking them to deposit a sum of rupees for 450.69 crores and also pay the penalty amount of 0.1% per day.

21. Petitioner filed a writ petition being WP (C) No. 12483/2019 before this Court impugning the demand notice dated 18.11.2019.

22. This court by order dated 26.11.2019 inter alia directed that the Writ Petition be treated as a Representation by the Petitioner to the Commissioner SDMC. It was also directed that the Commissioner SDMC, if he so desires, may nominate a retired judge of this court for the necessary hearing and passing of a reasoned order. Petitioner was also directed to pay a sum of Rs. 20 Crores per week.

23. Petitioner is thereafter alleged to have requested the Commissioner SDMC to appoint an independent adjudicator.

24. Petitioner thereafter filed another writ petition being WP (C) No. 570/2020 before this Court seeking adequate directions so as to enable it to collect toll tax/penalty from specified commercial vehicles evading the same by using free lanes.

25. It is alleged that no steps were taken by the Respondent Corporation for plugging the evasion of toll tax by vehicles using free lanes.

26. It is alleged that despite the request of the Petitioner to appoint a neutral adjudicator, the Commissioner SDMC continued with the hearing and passed the order dated 31.01.2020, rejecting the representation of the Petitioner. Said order is also impugned herein.

27. Pursuant to the rejection of the representation, Impugned Demand Notice dated 19.02.2020 was served on the Petitioner demanding a sum of Rs. 756.56 Crores within 14 days. Petitioner is also impugning the said demand notice dated 19.02.2020.

28. As per the Petitioner, the Ministry of Finance, Department of Expenditure Procurement Policy Division, Government of India by its Office Memorandum dated 19.02.2020 has declared spread of Corona Virus and covered it as a Force Majeure Clause.

29. By order dated 02.03.2020, Petitioner 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.

30. On 16.03.2020, taking recourse to Clause 17.3(a) of the Contract Agreement, SDMC issued the Notice of Termination effective 14.04.2020.

31. SDMC on 16.03.2020 also issued a Notice for Inviting Tender, inviting offers/bids for engagement of a contractor for Toll & ECC collection at border points from specified commercial vehicles entering Delhi.

32. Petitioner, in the meantime, sought modification of order dated 02.03.2020. Said order was modified by order dated 12.06.2020. 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. Petitioner was directed to deposit the amounts collected by the Petitioner into the account of the Respondent SDMC after deduction of 15% towards operation and maintenance charges, subject to final adjustment.

33. Petitioner thereafter filed a review petition seeking modification of order dated 12.06.2020 on two grounds. Firstly, that once the force majeure has been made applicable w.e.f. 19.02.2020, then the weekly payment of Rs.20 crores would stand suspended and as a corollary, the outstanding amount of Rs. 115.04 crores, would be reduced by roughly Rs. 38 crores and secondly that once the force majeure clause was made applicable from 19.02.2020, then that day becomes the cut-off date for suspension of all subsequent contractual obligations.

34. Said review petition was dismissed on 24.06.2020.

35. In the meantime, SDMC filed a Letters Patent Appeal challenging order dated 12.06.2020. Petitioner also filed a Letters Patent Appeal challenging order dated 24.06.2020 dismissing its review petition.

36. The Letter Patent Appeals were disposed of by the Division Bench by order 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) *****"

37. The Order of the Division Bench was impugned by SDMC before the Supreme Court in Special Leave Petition (C) 15173/2020. Said Special Leave Petition was disposed of by the Supreme Court on 12.01.2021 directing expeditious disposal of the Writ Petition. Since the Special Leave Petition arose out of interim orders, all points were left open.

SUBMISSIONS ON BEHALF OF THE PETITIONER BY DR. ABHISHEK MANU SINGHVI, MR. MUKUL ROHATGI & MR. RAJEEV NAYYAR, SENIOR ADVOCATES

38. It is contended by learned senior counsels for the Petitioner that the spread of Corona Virus is a Force Majeure event and though it had started earlier but was acknowledged by the Government of India to be effective on and from 19/02/2020. It is contended that the Respondent SDMC has also recognized the Corona Pandemic as a Force Majeure event and has said so even in their reply to the pre-bid query.

39. It is alleged that due to Force Majeure event there has been a gross reduction of traffic volume and it was not possible for the Petitioner to make the deposits.

40. It is further contended that as the Force Majeure event was in subsistence, non-payment of remittance and non-compliance of the order dated 02.03.2020 in W.P.(C) No. 2241 of 2020 directing Petitioner to deposit Rs. 20 Crores per week was not a default.

41. It is submitted that the SDMC has acted under a misconception that there has been a violation of the order dated 02.03.2020 and has erroneously issued the letter of Termination on 16.03.2020.

42. It is contended that though the notice of termination had provided a period till 14.04.2020 which was subsequently extended till 24.05.2020, Respondent had assumed that the termination had taken effect immediately. They had and illegally issued a fresh Notice Inviting Tender (NIT) on 16.03.2020, which was annulled on 04.04.2020 and a fresh NIT was issued on 06.04.2020. As only one bid was received, the NIT was cancelled and a fresh NIT was issued on 28.04.2020.

43. It is alleged that the bid thereafter received is almost half of the reserve price (i.e. Rs. 636 Crores), which is much lower than the price agreed to be paid by the Petitioner under the Contract Agreement, which substantiates the plea of the Petitioner that on account of various factors i.e. opening of the Eastern and Western Peripheral Expressways, evasion of tax by commercial vehicles using free lanes and the force majeure event, the collection is far below the agreed

amount and as such the Petitioner is entitled to reassessment and redetermination of the annual/weekly amount payable by the Petitioner to the SDMC towards toll tax.

44. It is submitted that the Reserve Price fixed in the NIT fortifies the assertion of the Petitioner that Petitioner is being forced by the Respondent to deposit an amount which is much higher than what is being collected.

45. It is submitted that Petitioner itself has a claim against the Respondent SDMC of Rs. 2414,71,83,529/- as on 31.03.2020 out of which Rs. 18,98,54,498/- was approved by the Competent Authority on 18.11.2019.

46. It is submitted that SDMC has prohibited collection of Toll Tax from the free lanes and this was concealed by the SDMC at the time of the 2017 Request for Proposal (RFP for short).

47. It is submitted by learned senior counsels for the Petitioner that the Survey Report of M/s Samarth Softech Solutions Ltd. appointed by the Respondent SDMC to carry out survey of probable reduction in entry of commercial traffic into Delhi, showed that due to opening of Eastern peripheral Expressway and Western peripheral Expressway the annual collection was Rs. 1,000 crores. which is far below the awarded contract of Rs. 1206 crores per annum.

48. It is submitted that the Corporation SDMC Respondent had resorted to making incorrect statements wrong projections in its bidding documents in order to compel the Petitioner to quote a higher amount as probable collection of toll tax.

49. Further, it is contended that the Respondent SDMC was under an obligation to ensure that all steps are taken to stop the leakage of specified vehicles entering Delhi without paying toll/municipal tax and Respondent has failed to take any steps whatsoever to stop the leakage of revenue from such vehicles and is therefore liable to make good the loss suffered by the Petitioner on account of its inaction and neglect.

50. It is submitted that the failure of SDMC to put in place traffic calming measures has effectively rewritten the terms of the RFP.

51. It is submitted that the survey conducted by Tescidel India Pvt. Ltd., to ascertain the data of commercial vehicles evading tax by moving through the free lanes has shown that on a daily average 35,315 vehicles are evading the payment of tax through free lanes causing an estimated evasion of Rs. 36,81,900/- per day.

52. Reliance is placed by learned senior counsel on the judgments of the Supreme Court in ABL International Ltd v. Export Credit Guarantee Corpn. of India Ltd., (2004) 3 SCC 564 and HSIDC v. Hari Om Enterprises, (2009) 16 SCC 208 to contend that once the State or an instrumentality of the State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably

which is the requirement of Article 14 of the Constitution of India and if the Respondent as an instrumentality of the State has acted in contravention of the requirement of Article 14, then a writ court can issue suitable directions to set right the arbitrary actions of the Respondent.

53. Further reliance is placed on the decision in Karnataka State Forest Industries Corpn. V. Indian Rocks, (2009) 1 SCC 150 to contend that ordinarily a superior court in exercise of its writ jurisdiction would not enforce the terms of a contract qua contract, but when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a writ petition would be maintainable.

54. It is submitted that toll collected by the Petitioner is in the nature of tax contemplated under Section 113 (2) (g) of the Delhi Municipal Corporation Act, 1957 and the contractual interpretation and conduct of the Respondent is perverse and goes far beyond the legislative sanction on the basis of which the present contract had been entered into. It is submitted that in the guise of "terms of contract", the statutory provisions and constitutional requirements cannot be circumvented or avoided and this aspect is necessarily to be adjudicated in proceedings under Article 226 of the Constitution.

55. It is contended that Petitioner is merely a Collection Agency and the relationship between the Petitioner and Respondent Corporation is that of Principal/Agent and it is not permissible for the SDMC to charge more than what the Petitioner is able to collect on account of toll tax from vehicles entering the NCT, Delhi.

56. It is submitted that Dispute Resolution Clause i.e. Clause 16 of the Contract Agreement has become unworkable as the Commissioner failed to appoint a competent officer and continued to act as the competent officer till 16.12.2019 and thereafter has referred the claims of the Petitioner to a High Level Committee which is not contemplated by the Dispute Resolution Clause.

57. It is further submitted that as the traffic volume has not resumed to 90% of the pre lockdown volume, Petitioner is not liable to pay the contracted amount but is only liable to pay the amount actually collected after deduction of administrative and toll collection expenses @7.5%.

SUBMISSIONS ON BEHALF OF THE RESPONDENT BY MR. HARISH SALVE, SENIOR ADVOCATE, MR. SANJAY JAIN, ADDITIONAL SOLICITOR GENERAL & MR. SANJAY PODDAR, SENIOR ADVOCATE

58. Learned Senior Counsels appearing for the Respondent have objected to the maintainability of the Writ Petition.

59. It is contended that the Petitioner had entered into a contract with the Respondent Corporation, after participating in the bidding process. It is submitted that the disputes raised are contractual in nature and purely governed by the terms of the Agreement between the parties.

60. It is submitted that the petition seeking to invoke Article 226 of the Constitution of India is misconceived and as such the petition is liable to be dismissed and parties should be relegated to seek their respective reliefs before appropriate forums in accordance with the terms of the contract and law.

61. It is submitted that the conditions in which the toll was to be collected was fully disclosed. Petitioner was not new to the scene and was the outgoing contractor and it participated in the bidding process being aware of all the ground realities. Petitioner accepted the terms and conditions of the bid and offered to unconditionally pay, a sum of Rs. 1206 Crores per annum amounting to a weekly instalment of Rs. 23.12 crores.

62. It is submitted that the terms and conditions of the contract are set out in a language which admits of no ambiguity. The Toll Tax & ECC Collection Agreement dated 28.09.2017 is an extensive document and the entire Tender document (NIT), Pre-bid queries and their reply, Request For Proposal (RFP), addendums etc. are part of the Contract Agreement.

63. It is submitted that Petitioner had agreed to pay Fixed contractual amount of Rs. 1206 Crores with weekly remittance of Rs. 23.12 Crores subject to enhancement of 5% every two years. Petitioner was to develop, upgrade, operate and maintain the Toll Tax barriers, Posts and Toll Plazas at the site.

64. It is submitted that as per the Contract Agreement, Petitioner not 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 details and location of 124 toll plazas indicating the infrastructure, associated peripherals for toll plazas, toll rates and site inventory of 124 toll plazas along with the number of lanes available on a particular Toll Plaza as well as number of lanes available for collection of toll tax / ECC were also clearly stated.

65. It is submitted that the use of Rajokri toll plaza was specifically agreed to be given on "as is where is basis". Further, it is an admitted position that Petitioner was part of the Joint Venture M/s. SMYR, which, was operating the Toll points in the year 2015 - 16 and as such was well aware of the grounds realities.

66. It is submitted that the Survey Report of M/s Tescidal was only an internal assessment to understand the traffic volumes and the trend of evasion of toll tax by specified commercial vehicles. Said study did not differentiate between traffic moving from free lane without paying toll tax and the traffic that flows on the basis of monthly passes. The study also did not factor the penalty collected by the Petitioner from the persons evading payment of toll tax. It is submitted that in fact, the survey showed the inability of the Petitioner to collect toll from evading vehicles.

67. With regard to the Survey Report of M/s Samarth Softech Solutions Ltd., it is submitted that the survey was conducted for a short 7 day period at 20 points

out of 124 points and the survey was based on certain assumptions. It is submitted that as per the Report, the fall in revenue of Toll Tax due to opening of Eastern & Western Peripheral Expressway was around 0.02%. The study also did not take into consideration annual growth of traffic.

68. It is submitted that the Petitioner was aware about the proposed Eastern and Western Peripheral Expressways and the possibility of reduction of traffic on their opening. Even Pre-bid query had been specifically made about compensation on account of proposed two new periphery roads (Eastern & Western Expressway), reduced traffic due to implementation of GST and reduction in traffic volume etc. Said query was Respondent to by the SDMC clarifying that there was no provision for compensation in the RFP but a new clause regarding "surrender of contract" had been introduced, which provided that the contractor could surrender, at any time during the duration of the agreement, by giving only a 90 day notice. In case surrender notice was issued after 12 months, only 25% of the Performance Guarantee was to be forfeited and in case surrender took place within 12 months or without notice, 100 % of the Bank Guarantee was to be forfeited.

69. Further, it is submitted that, being part of the joint venture (M/s. SMYR), Petitioner was well aware of the proceedings pending before the Supreme Court with regard to the constructions of the two new periphery roads (Eastern & Western Expressway) and the orders passed therein from time to time.

70. It is submitted that because of persistent defaults by way of either delays or non-payment, penalties were imposed and demand notice was issued on 18.11.2019 demanding a sum of Rs 450.69 crores.

71. It is submitted that the Plea of the Petitioner that force majeure clauses would apply is misconceived. It is submitted that the defence of force majeure in the relation to the performance of obligations under a contract is a contractual dispute and a Petition for judicial review cannot be used as a mechanism for resolution of contractual disputes arising out of a force majeure clause in a contract.

72. Without prejudice, it is submitted that the first lockdown came into place on 24.03.2020. The termination was prior to the declaration of the lockdown. Even after lifting of the lockdown, Petitioner made no attempts to catch up with the shortfalls and continued to raise various defences in support of his conduct of pocketing taxes collected on behalf of SDMC from the taxpayer.

73. It is further submitted that the conduct of the Petitioner does not merit any relief under Article 226 of the Constitution of India as the Petitioner is guilty of several contractual breaches like payment of only about Rs. 4 Crores a week instead of the agreed amount of about Rs.24 crores; non supply of Data since October 2019 till date; non issuance of Fast Tags, RFID equipment, cameras, etc. not being repaired etc.

ANALYSIS & REASONING

74. The relationship between the parties is governed by the Toll Tax & ECC Collection Agreement dated 28.09.2017 admittedly entered into by the Parties.

75. The Contract Agreement dated 28.09.2017 specifically stipulates that the offer, the terms and conditions of offer set forth in Exhibit A-1 to A-3 of the said Agreement along with Letter of Intent (Annexure-I), Addendum-I (Annexure-II), Pre-bid reply (Annexure-III) Addendum-II (Annexure-IV), Letter of Acceptance (Annexure-V) etc., of Exhibit A-3 and the letter of award and every part thereof are binding upon the Contractor and shall govern the relationship between the Contractor and the SDMC in relation to the matters provided thereunder.

76. It further provides that if any inconsistency occurs; between the express provision of the Agreement and other stipulations elsewhere, provisions of the said Agreement shall prevail and in case of inconsistency inter se in the meaning of two similar stipulations, the same would be resolved by referring the inconsistent stipulations to the Commissioner of the SDMC, whose decision in that regard shall be final and acceptable to the Contractor and shall be a part of the Agreement as if it was originally agreed between the Parties.

77. The agreement further provides that other terms and conditions, in particular about the procedure, or the manner of performance of the Agreement and such other aspects not specifically provided in the Agreement shall be regulated by written instructions issued by the SDMC and/or its authorised officer in that behalf as also the direction passed by the Supreme Court from time to time in W.P. (C) 13029/1985 titled as M.C. Mehta Vs. UOI & Ors.

78. The Supreme Court of India in *Tata Cellular v. Union of India*, (1994) 6 SCC 651 has held that "The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts." It further held that the Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

79. The Supreme Court further in *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617 held that "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding

to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

(underlining supplied)

80. The Constitution Bench of the Supreme Court of India in *Har Shankar v. Excise & Taxation Commr.*, (1975) 1 SCC 737 while dealing with an objection as to maintainability of the writ petitions on the ground that the Petitioners who had offered their bids in the auctions did so with a full knowledge of the terms and conditions attaching to the auctions and they could not, by their writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids, held that "The terms and conditions of auctions were announced before the auctions were held and the bidders participated in the auctions without a demur and with full knowledge of the commitments which the bids involved. The announcement of conditions governing the auctions were in the nature of an invitation to an offer to those who were interested in the sale of country liquor. The bids given in the auctions were offers made by prospective vendors to the Government. The Government's acceptance of those bids was the acceptance of willing offers made to it. On such acceptance, the contract between the bidders and the Government became concluded and a binding agreement came into existence between them. The successful bidders were then granted licences evidencing the terms of contract between them and the Government, under which they became entitled to sell liquor. The licensees exploited the respective licences for a portion of the period of their currency, presumably in expectation of a profit. Commercial considerations may have revealed an error of judgment in the initial assessment of profitability of the adventure but that is a normal incident of all trading transactions. Those who contract with open eyes must accept the burdens of the contract along with its benefits."

81. Further the Supreme Court of India in *New Bihar Biri Leaves Co. v. State of*

Bihar, (1981) 1 SCC 537 held that "It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms of the contract which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobat* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to say, no party can accept and reject the same instrument or transaction (Per Scrutton, L.J., *Verschures Creameries Ltd. v. Hull & Netherlands Steamship Co.* [(1921) 2 KB 608]; see *Douglas Menzies v. Umphelby* [1908 AC 224, 232]; see also *Stroud's Judicial Dictionary*, Vol. I, p. 169, 3rd Edn.). Further that "the aforesaid inhibitory principle squarely applies to the cases of those Petitioners who had by offering highest bids at public auctions or by tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned Condition (13) on the ground that this condition is violative of Articles 19(1)(g) and 14 of the Constitution."

82. In *Puravankara Projects Ltd. v. Hotel Venus International*, (2007) 10 SCC 33, the Supreme Court of India held that there is a vital distinction between the administrative and contractual law decisions. The concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract. Duty to act fairly which is sought to be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract is not covered by any doctrine of fairness or reasonableness. The duty to act fairly and reasonably is a doctrine developed in administrative law field to ensure the rule of law and to prevent failure of justice when the action is administrative in nature. Just as the principles of natural justice ensure fair decision where function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action when the function is administrative. But the said principle cannot be invoked to amend, alter or vary the expressed terms of the contract between the parties.

83. The Supreme Court of India in *Excise Commr. v. Issac Peter*, (1994) 4 SCC 104 held that "in contracts - which may be called executory contracts - there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Such contracts do not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - profit and loss being normal incidents of a business. There is no room for invoking the doctrine of unjust enrichment in such a situation. The said doctrine has never been invoked in such business transactions. The remedy provided by Article 226, or for that matter, suits, cannot be resorted to wriggle out of the contractual obligations entered into by the licensees..... Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the

administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract - or rather more so. It is one thing to say that a contract - every contract - must be construed reasonably having regard to its language.

84. The Supreme Court of India in *Excise Commr. v. Issac Peter* (supra) further held that "in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. It bears repetition to say that the State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. We reiterate that what we have said hereinabove is in the context of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation."

85. From the above referred judgments of the Supreme Court, the following propositions of law emerge:

(i) The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.

(ii) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must have freedom of contract.

(iii) Where the terms and conditions of auctions, which are in the nature of an invitation to an offer, are announced before the auctions are held and the bidders participate in the auctions without a demur and with full knowledge of the commitments which the bids involved, the bids given in the auctions would be offers made by prospective vendors to the Government.

(iv) On Government's acceptance of those bids, the contract between the bidders

and the Government would be concluded and a binding agreement would come into existence between them.

(v) Those who contract with open eyes must accept the burdens of the contract along with its benefits.

(vi) Where bidders offer their bids in the auctions with full knowledge of the terms and conditions attaching to the auctions and they cannot, by their writ petitions, be permitted to wriggle out of the contractual obligations arising out of the acceptance of their bids.

(vii) There is a vital distinction between the administrative and contractual law decisions. The concept of administrative law and fairness should not be mixed up with fair or unfair terms of the contract.

(viii) Duty to act fairly cannot be imported into a contract to modify and/or alter its terms and/or to create an obligation upon the State Government which is not there in the contract.

(ix) In executory contracts - there is always an element of risk. Many an unexpected development may occur which may either cause loss to the contractor or result in large profit. Such contracts do not imply a warranty - or a guarantee - of profit to the contractor. It is a business for him - profit and loss being normal incidents of a business.

(x) In case of contracts entered into between the State and its citizens pursuant to public auction, floating of tenders or by negotiation, mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. There is no compulsion on anyone to enter into these contracts. 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. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State.

(xi) The decision to enter into a contract is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

(xii) Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

(xiii) Bidders who offer highest bids at public auctions or by tenders, accept and work out the contracts cannot be permitted to resist the demands or other action, arising out of the contract on the ground that the conditions are violative of Articles 19(1)(g) and 14 of the Constitution.

86. If each of the reliefs sought by the Petitioner is examined in the light of the above propositions of law, it is noticed that the Petitioner is either seeking modification of the terms and conditions of the contract or claiming a relief under a term of the contract or to prevent the Respondent corporation from enforcing its rights under the terms and conditions of the contract.

87. Prayer (a) of the Writ Petition seeks appointment of an independent Adjudicator to adjudicate the claims of the Petitioner. Prayer (b) Of the Writ Petition seeks a declaration 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.

88. The terms and conditions of the contract would govern the dispute resolution process.

89. Respondent has relied upon clause 16 of the Request For Proposal appended to the Contract Agreement to contend that all questions of disputes are to be referred to the Competent Officer and his decision is appealable to the Commissioner SDMC.

90. It is submitted on behalf of the Petitioner that said clause has become unworkable as the Competent Officer was not appointed by the Commissioner SDMC till 16.12.2019 and the Commissioner SDMC continued to act as the Competent Officer.

91. Admittedly, Petitioner at the time of entering into the Contract agreed to be bound by the terms and conditions of the same including Clause 16, which provides for a Dispute Resolution Process. Whether the said clause has become unworkable or not, is a disputed question of fact, which cannot be gone into in a Writ Petition under Article 226 of the Constitution of India.

92. The prayer of the Petitioner for appointment of an independent adjudicator cannot be granted, even if clause 16 had become unworkable because of action or inaction of the Commissioner SDMC. All contractual disputes have to be settled in accordance with the stipulations of the Contract. If the stipulations do not provide for any alternative dispute resolution mechanism, they have to be settled in terms of the Contract Act in a court of law.

93. Prayers (c) of the Writ Petition seeks quashing of the order dated 31.01.2020, passed by the Commissioner SDMC rejecting the representation of the Petitioner; prayer (d) seeks quashing of the demand Notice dated 14.02.2020, issued consequent to Order dated 31.01.2020; prayer (e) Seeks stay of the demand Notice dated 14.02.2020 pending the writ petition.

94. The representation of the Petitioner that was disposed of by order dated 30.01.2020 (communicated by letter dated 31.01.2020) is also covered by prayers (f) to (i) of the Writ Petition.

95. Petitioner, in prayer (f) has sought a declaration that in the guise of section

113 (2) (g) of the Delhi Municipal Corporation Act, 1957, Petitioner cannot be compelled to pay to the Respondent Corporation, more than the actual amount collected towards toll tax from commercial vehicles entering the NCT, Delhi; in prayer (g) Petitioner seeks a direction to 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; in prayer (h) Petitioner seeks a mandamus to 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 free lanes; in prayer (i) Petitioner seeks quashing of the demand of 0.1 % per day that is 36.5% per annum.

96. Prayers (f) to (i) of the writ petition seeks alteration and modification of the terms and conditions of the contract. When the admitted facts are considered in the light of the legal propositions, noticed hereinabove, it is seen that Petitioner voluntarily made their bid with full knowledge of the terms and conditions attaching to the auction.

97. Since petitioner voluntarily agreed to pay a fixed amount per annum, it cannot now seek to contend that Corporation cannot seek more than the actual amount collected towards toll tax from commercial vehicles entering Delhi. It was a tender stipulation and Petitioner accepted the same and made its bid. Petitioner is silent about what would happen in case it collects more than what it has agreed to pay. One of the contentions of the Respondent - Corporation is that Petitioner has not been sharing the data with it.

98. The prayer of the Petitioner seeking 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 and to make a suitable downward revision in the weekly/annual remittance or quashing of the demand of 0.1 % per day that is 36.5% per annum are also purely covered within the ambit of the contractual terms. Petitioner has accepted the terms and conditions of the Contract Agreement and submitted its bid.

99. Article 226 of the Constitution of India cannot be invoked by the Petitioner to wriggle out of the contractual obligations arising out of the acceptance of their bids or to modify and/or alter the terms of the Contract Agreement or to create an obligation upon the Respondent Corporation which is not there in the Contract Agreement.

100. Representation of the Petitioner has been disposed of by the Commissioner keeping in view the contractual terms and consequently the demand has been raised on the Petitioner to pay the agreed amount and the penalty interest stipulated in the contract. The same does not warrant any interference in exercise of powers under Article 226 of the Constitution of India. This of course

would be without prejudice to the right of the Petitioner to impugn the same in light of the agreed terms of the contract before appropriate civil forum.

101. Petitioner, in prayers (iA) & (j) of the Writ Petition seeks quashing of termination dated 16.03.2020 issued by the Respondent; in prayers (iB) & (k) seeks quashing of the NIT dated 28.04.2020 issued by the Respondent consequent to the notice of termination dated 16.03.2020; in prayers (iC) & (l) seeks keeping in abeyance the Termination Notice dated 16.03.2020 and the NIT dated 28.04.2020 for fresh bidding for collection of tax, till the final disposal of the instant writ petition and in prayer (m) seeks a direction that the money appropriated by the Respondent by way of encashment of bank guarantee for Rs. 64 Crore, be held by the Respondent as a security deposit after adjusting therefrom the amount payable by the Petitioner towards the ECC.

102. The termination notice issued by the Respondent Corporation, consequent issuance of NIT and the invocation of the Bank Guarantee are in alleged exercise of the rights under the Contract Agreement. The High Court in exercise of powers under Article 226 of the Constitution of India would not interdict or intercede in the exercise of contractual rights under an agreement.

103. The conduct of parties is governed by the Contract Agreement and the law of contract. Contractual rights cannot be tested on the anvil of Article 14 of the Constitution of India.

104. Parties are liable to perform their respective obligations under a contract and on failure to perform their respective obligations, suffer the stipulated contractual consequences. The High Court in exercise of powers under Article 226 of the Constitution of India would not intervene in the same unless overwhelming public interest requires interference. It is not even contended on behalf of the Petitioner that there is any overwhelming public interest involved, requiring interference.

105. The Judgment in the case of ABL International Ltd v. Export Credit Guarantee Corpn. of India Ltd., and HSIDC v. Hari Om Enterprises (supra) relied upon by learned senior counsel for the Petitioner does not further the case of the Petitioner. Petitioner was required to show that Respondent Corporation has not acted fairly, justly and reasonably or that the action is arbitrary. However, Petitioner has failed to show so. As noticed above the grounds raised by the Petitioner are covered within the ambit of the contract and as such not amenable to judicial scrutiny.

106. In ABL International Ltd v. Export Credit Guarantee Corpn. of India Ltd., (supra) the Supreme Court also sounded a word of caution that while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not

to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

107. As noticed herein above, Respondent Corporation is alleged to have acted purely within the four corners of the Contract Agreement and sought to exercise its rights under the Contract Agreement to enforce the obligations imposed upon the Petitioner. Petitioner has the remedy of enforcing its rights under the Contract Agreement in terms of the contract act before an appropriate Civil Forum. This court in exercise of powers under Article 226 of the Constitution of India would not go into a purely contractual dispute.

108. Petitioner has also not been able to make out a case to show that the action of the Respondent Corporation is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India to bring it within the parameters laid down by the Supreme Court of India in Karnataka State Forest Industries Corpn. V. Indian Rocks, (supra) (relied upon by learned senior counsel for the Petitioner) warranting exercise of powers under Article 226 of the Constitution of India.

109. In view of the above, the objection raised by the Respondent that Petitioner cannot invoke the extraordinary Writ jurisdiction of this court under Article 226 of the Constitution of India is sustained. The Writ Petition is held to be not maintainable.

110. Parties would have to resolve their disputes and enforce their respective rights in accordance with the Contract Act in appropriate civil proceedings before the appropriate Court.

111. The Writ Petition is dismissed and consequently all interim orders are vacated.

112. It is clarified that nothing stated hereinabove shall amount to an expression of opinion on the merits of the contentions of either party. All rights and contentions are reserved.

113. Copy of this Order be uploaded on the High Court website forthwith and be forwarded to learned counsel for the parties by the Court Master.