
(2011) 02 DEL CK 0069
In the Delhi High Court
Case No : FAO (OS) 714 of 2010

MIC Electronics Ltd. and Another

APPELLANT

Vs

Municipal Corporation of Delhi and Another

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

Citation : (2011) 2 AD 625 : (2011) 1 ARBLR 418

Hon'ble Judges : Vikramajit Sen, J; Siddharth Mridul, J

Bench : Division Bench

Advocate : Ramji Srinivasan, Rajeev Kumar, Zeyaul Haque and Alka Srivastava, for the Appellant; Pinky Anand and Mini Pushkarna, for the Respondent

Final Decision : Dismissed

Judgement

Siddharth Mridul, J.—The present is an appeal u/s 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the said Act") against the judgment dated 15th December, 2010 in OMP No. 742/2010 whereby the application of the Appellant u/s 9 of the said Act was dismissed.

2. The petition u/s 9 of the said Act filed by the Appellant prayed for the following reliefs:

(i) stay the operation of the letter dated 25/11/2010 cancelling the contract for display of advertisement through LED screens in market areas and forfeiture of the security amount, by the Respondent MCD.

(ii) direct the parties to maintain status quo in respect of the possession and operation of the 9 sites.

(iii) restrain the Respondent MCD from taking any steps for recovery of the impugned demand in terms of the letter dated 25/11/2010, pending the disposal of arbitration proceedings.

(iv) injunct the Respondent MCD from calling any tender for remaining 41 sites till the conclusion of the arbitration proceeding.

(v) pass ex-parte orders in respect of prays at serial Nos. (i) to (iv).

(vi) pass such other or further order(s) as it may deem fit and proper keeping in view the fact and circumstances of the case.

3. The facts as are necessary for the adjudication of the present appeal are that:

(a) A contract was entered into between the Appellant and the Respondent for display of advertisement through 50 LED screens at selected market areas of Delhi under the jurisdiction of Municipal Corporation of Delhi (MCD), Respondent herein, for a period of five years at the monthly licence fee of Rs. 1,01,750/- per screen per month totaling up to Rs. 50,87,500/- for all the screens. In this behalf it is stated that the tender notice dated 19th March, 2009 with details of sites to be provided for setting up of the LED screens was issued by the Respondent. It is further pertinent to note that the terms and conditions prescribed by the Respondent under the heading "Terms and Conditions" itself contained the expression "under the jurisdiction of MCD".

(b) Clause 2(a) of the terms and conditions prescribed the incubation period as two months of contract whereby no licence fee was to be charged for this period. The clause further provided that payments were to be made from the third month for the actual number of screens which had been set up by then. However, from the seventh month onwards payment had to be made for all 50 LED screens.

(c) Clause 5 of the terms and conditions contains description of the sites wherein it was prescribed that inspection of sites before filing of tender to be made and if required clarifications be sought thereupon. This clause debarred any objection, dispute or grievance to be raised regarding the sites after submission of tenders.

(d) Clause 6 relied upon by the Appellant provided for flexibility in the contract to the effect that it was specified that there may be an increase or decrease in the number of sites and, therefore, the licence fee would accordingly be charged in relation to the number of sites available. This clause further provided that if any site was removed in public interest or for any other reason, alternate site would be provided to the Appellant by the Respondent herein. If for any other reason site was not available their licence fee/ground rent was to be remitted back according to pro-rata basis.

(e) Clause 10 of the agreement provided that if payment was not made in the stipulated manner, a late fee of 2% per month was liable to be charged. It further provided that if the licence fee/ground rent are not received by the 10th of the succeeding month, the contract would be liable to be terminated.

(f) Clause 16 of the said agreement provided that the LED screens would be displayed only at the allotted sites and positions as may be determined by the Respondent. Clause 28 of the agreement provided for arbitration.

(g) On 4th August, 2009 consequent upon deposit of security the Respondent

issued an allotment letter in respect of the 50 LED display screens and after the grant of allotment on 25th June, 2009 the parties entered into the agreement in respect of these screens. Thereafter, the Appellant states that, out of the 50 designated sites 25 sites did not fall either within the jurisdiction of the MCD or were not permitted by traffic police as violating the Supreme Court guidelines in this behalf.

(h) The Appellant also states that it paid licence fee to the Respondent from 10th October, 2009 to 13th July, 2010 amounting to Rs. 2,95,07,747/-(first seven months). Since payment were not made for all the 50 sites and the cheques furnished to the Respondent were dishonoured when presented for encashment, show cause notice dated 27th October, 2010 was issued to the Appellant as to why the contract be not cancelled and the security amount not forfeited for violation of the terms and conditions of the contract. The Respondent also demanded a balance outstanding payment of Rs. 3,05,25,000/- towards arrears of licence fee.

(i) A reply was filed on behalf of the Appellant through letters dated 27th October, 2010 and 28th October, 2010 wherein the Appellant stated that they were liable to pay for only the 20 operational sites.

(j) The subject contract was cancelled by the Respondent vide letter dated 25th November, 2010 and the said cancellation order provided for recovery of dues within a period of three days from the receipt of the said order dated 25th November, 2008.

(k) The Appellant challenged the cancellation of contract vide Writ Petition (Civil) No. 8114/2010. The writ petition was disposed of on 3rd December, 2010 as the agreement between the parties contained an arbitration clause. The arbitration proceedings were invoked by the Appellant and Arbitrator has been appointed on 11th January, 2011.

(l) Aggrieved by the action of the Respondent, the Appellant, thereafter, filed OMP No. 742/2010 u/s 9 of the said Act praying for interim protection as set out hereinabove. Vide the impugned order dated 15th December, 2010 the learned Single Judge came to the conclusion that the Appellant had been unable to make out a prima facie case for the grant of any interim relief and thereby dismissed the said OMP.

(m) Aggrieved by the dismissal of its petition u/s 9 of the said Act, the Appellant has preferred the present appeal as aforesaid.

4. On behalf of the Appellant Mr. Ramji Srinivasan, learned Senior Counsel, first submitted that out of the 50 sites provided by the Respondent 25 sites were either not under the control of the Respondent or objections were raised by the traffic police, market associations and car parking contractors. In this behalf, it was submitted that various letters had been addressed to the Respondents enumerating the various hurdles faced by the Appellant and the objections to the

sites provided by the Respondent. In this behalf the Appellant further submitted that only 9 sites could be successfully installed by the end of October, 2010 and 16 sites were under consideration at that time. With regard to the remaining 25 sites, according to the Appellant, work could not even be started due to the non-viability from technical, commercial or other reasons. It was next urged by the learned Senior Counsel appearing on behalf of the Appellant that clauses 6 and 16 of the subject contract provided for an increase or decrease in the number of sites and payment of licence fee proportionally thereto and, therefore, the impugned order fell into error in not appreciating that the Appellant could have been allowed to continue to operate the licence in respect of 9 chosen sites and not in respect of others.

5. Per contra, on behalf of the Respondent, Ms. Pinky Anand, Senior Counsel, submitted that Section 14(1)(c) of the Specific Relief Act specifically provided that a contract which is in its very nature determinable could not be specifically enforced, which is what the Appellant were seeking by way of the present Appeal.

6. It was then urged on behalf of the Respondent that Section 41(e) of the Specific Relief Act categorically provided that an injunction could not be granted to prevent the breach of a contract, the performance of which would not be specifically enforced. In this behalf the Respondent relied upon the decisions of this Court in *Rajasthan Breweries Ltd. v. The Stroh Brewery Company* 2000 (3) Arb. LR 509 (Delhi) and *Raj Electricals (Regd.) Vs. BSES Rajdhani Power Ltd.*, . It was further urged on behalf of the Respondent that the 50 sites which were the subject matter of the contract had been identified by the Appellant themselves and were all within the jurisdiction of the Respondent. It was also urged that although the agreement was entered into in the month of June, 2009 the first objection with regard to the purported non-viability of the sites were raised only in the month of December, 2009. It was lastly urged on behalf of the Respondent that if the Arbitral Tribunal came to the conclusion that the cancellation of the contract was bad, in that event, the Appellant would be entitled to damages.

7. In rejoinder, it was urged on behalf of the Appellant that the Respondent were performing a public function or a public duty and that while discharging such a public duty Article 14 of the Constitution of India required it to act fairly, justly and reasonably. In other words, it was urged that the Respondent being State cannot cast off its personality and exercise unbridled power unfettered by the requirement of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of contract without anything more. In this behalf, the Appellant relied on the decision of the Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*,

8. Before considering the submissions made on behalf of the parties, it would be appropriate to refer to the relevant extract of the decisions cited on their behalf. In *ABL International Ltd.(supra)* the Supreme Court observed as follows:

52. On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the Appellants in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question, in our opinion, lies squarely in the decision of this Court in the case of *Shrilekha Vidyarthi* wherein this Court held:

The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14 - non-arbitrariness which is basic to rule of law - from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations

would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

In Rajasthan Breweries Ltd. (supra) a Division Bench of this Court held as follows:

19. Even in the absence of specific clause authorising and enabling either party to terminate the agreement in the event of happening of the events specified therein, from the very nature of the agreement, which is private commercial transaction, the same could be terminated even without assigning any reason by serving a reasonable notice. At the most, in case ultimately it is found that termination was bad in law or contrary to the terms of the agreement or of any understanding between the parties or for any other reason, the remedy of the Appellants would be to seek compensation for wrongful termination but not a claim for specific performance of the agreements and for that view of the matter learned Single Judge was justified in coming to the conclusion that the Appellant had sought for an injunction seeking to specifically enforce the agreement. Such an injunction is statutorily prohibited with respect of a contract, which is determinable in nature. The application being under the provisions of Section 9(ii) (e) of the Arbitration and Conciliation Act, relief was not granted in view of Section 14(1)(c) read with Section 41 of the Specific Relief Act. It was rightly held that other clauses of Section 9 of the Act shall not apply to the contract, which is otherwise determinable in respect of which the prayer is made specifically to enforce the same.

Consequently, therein no merit in the appeal, the same is dismissed.

In Raj Electrical (Supra) a Single Judge of this Court held as follows:

11. Like any other contract this contract is also to be governed by the commercial interest of the parties. If the Respondent considers that the arrangement which was made by DVB of Single Point Distribution seeking services of the contractor has outlived its utility and the Respondent was in a better position to serve the people of the area, the Respondent can terminate the contract and suffer the consequences in terms of agreement between the parties. The Court cannot compel the Respondent to continue with an agreement. The Respondent who is a company incorporated for supply and distribution of electricity has a better infrastructure available with it to fulfill the needs of the electrification of the areas. While the contractors who are either individuals or firms in fact were introduced merely to overcome a problem which erstwhile DVB could not tackle at the time. A contractor cannot be made a permanent feature of the electricity supply system. It is a right and obligation of the Respondent to supply electricity in the area for which Respondent is a licensee under Delhi Electricity Reforms Act, 2000. If the Respondent considers it can provide better

services and facilities it can always terminate the contract of the contract Ors.

12. Even otherwise in order to grant any injunction u/s 9 of the Arbitration Act, the Court can grant such a relief only if an irreparable loss or injury is going to be caused to the party. In the present case, there is no question of irreparable loss or injury since the agreement itself provides that in case of wrongful termination of the agreement either party shall be entitled to the damages. Damages in such case can be determined by the arbitrator to whom the dispute is referred. Even otherwise where the party can be compensated by way of damages, the Court should refrain from issuing interim injunction.

9. Coming to the submissions made on behalf of the parties, the principal contention of the Appellant is that the relationship between the parties would be governed by public law principles and not by the private law principles governing contractual matters. In this behalf, it is observed that in *ABL International Ltd.* (supra), whilst relying on the law laid down in *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , the Supreme Court held that the requirements of Article 14 extends even in the sphere of contractual matters and the claim of the parties to be governed therein does not undergo a radical change merely because some contractual rights accrue to the other party in addition. Therefore, in other words, it was held that total exclusion of Article 14 - non-arbitrariness which is basic rule of law - from State actions in contractual field is not justified. Thus, the Supreme Court held that the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. However, it is observed that the decision of the Supreme Court in *ABL International Ltd.*(supra) is not an authority for the proposition that the mutual rights and liabilities of the parties where the contracts are freely entered into with the State are exclusively governed by public law principles and not by the terms and conditions of the contracts and the laws relating to contracts.

10. Further, in *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, , the Supreme Court held:

26. Learned Counsel for Respondents then submitted that doctrine of fairness and reasonableness must be read into contracts to which State is a party. It is submitted that the State cannot act unreasonably or unfairly even while acting under a contract involving State power. Now, let us see, what is the purpose for which this argument is addressed and what is the implication? The purpose, as we can see, is that though the contract says that supply of additional quota is discretionary, it must be read as obligatory - at least to the extent of previous year's supplies - by applying the said doctrine. It is submitted that if this is not done, the licencees would suffer monetarily. The other purpose is to say that if the State is not able to so supply, it would be unreasonable on its part to demand the full amount due to it under the contract. In short, the duty to act fairly is

sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned Counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness of 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. But this is not what the licencees say. They seek to create an obligation on the other party to the contract, just because it happens to be the State. They are not prepared to apply the very same rule in a converse case, i.e., where the State has abundant supplies and wants the licencees to lift all that stocks. The licencees will undertake no obligation to lift all those stocks even if the State suffers loss. This one-sided obligation, in modification of express terms of the contract, in the name of duty to act fairly, is what we are unable to appreciate. The decisions cited by the learned, counsel for the licencees do not support their proposition. In *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, , it was held that where a public authority is exempted from the operation of a Statute like Rent Control Act, it must be presumed that such exemption from the statute is coupled with the duty to act fairly and reasonably. The decision does not say that the terms and conditions of contract can be varied, added or altered by importing the said doctrine. It may be noted that though the said principle was affirmed, no relief was given to the Appellant in that case. *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, , was a case of mass termination of District Government Counsel in the State of U.P. It was a case of termination from a post involving public element. It was a case of non-government servant holding a public office, on account of which it was held to be a matter within the public law field. This decision too does not affirm the principle now canvassed by the learned Counsel. We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, 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 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 no guarantee profit to the licencees in such contracts. There is no warranty against incurring losses. It is a businesses for the licencees. 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 licencees 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. It is not necessary to say more than this for the purpose of these cases. What would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation, we need not express any opinion herein.

11. The decision in Issac Peter(supra) was re-stated with approval and affirmed by the Supreme Court in S.K. Jain Vs. State of Haryana and Another, . These decisions of the Supreme Court therefore affirm the view 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 of the contracts, 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 and the law relating to contracts. It is seen that the contract in the present case was entered into pursuant to floating of tender and there was no compulsion on anyone to enter into the contract. Therefore, there can be no question of State power being involved in such a voluntary contract. Therefore, there is no force in the submission made on behalf of the Appellant that only public law principles would exclusively apply to the relationship between the parties and that private law principles flowing from the terms of the contract would have no application to the subject contract. Even otherwise it is noted that the cancellation of the licence had taken place after issuance of a show cause notice and calling for the reply of the Appellant.

12. The next question that needs to be considered is the contention of the Respondent that the contract between the parties was in its very nature determinable and consequently could not be specifically enforced by way of the present proceedings. In this behalf, it is observed that the Appellant did not pay the agreed licence fee in terms of the licence agreement. Consequently, after issuance of the show cause notice and calling for a reply from the Appellant the Respondent cancelled the licence under the terms of the agreement between the parties. Therefore, the licence stood terminated, as correctly observed by the learned Single Judge, in the impugned order, and the legality or illegality of termination would be a matter to be determined in arbitration. Further, the justification given by the Appellant for not paying the licence fee will be examined in the arbitral proceedings. The case of the Appellant that, owing to the failure of the Respondent to perform obligations under the agreement, and the latter's refusal to decrease the number of LED screens in terms of Clause 6 of the agreement, would also be considered by the Arbitral Tribunal. In this

behalf, we, therefore, find considerable merit in the submission made on behalf of the Respondent that if the cancellation of the contract by the Respondent constitutes a breach of contract on their part, the Appellant would be entitled to damages. In other words, the questions whether the termination is wrongful or not or whether the Respondent was not justified in terminating the agreement, are yet to be decided. However, from the facts of the case there is no manner of doubt that the contract was by its very nature terminable, in terms of the contract between the parties themselves.

13. In Rajasthan Breweries Ltd.(supra), a Division Bench of this Court observed that, at the most, in case ultimately it is found that termination is bad in law or contrary to the terms of agreement or of any understanding between the parties or for any other reason, the remedy of the Appellant was to seek compensation for wrongful termination and not a claim for specific performance of the agreement. Further, in this view of the matter, there was every reason to come to the conclusion that the relief sought by the Appellant in terms of an injunction seeking to specifically enforce the agreement, by permitting the Appellant to continue to operate the 9 LED screens installed them, was statutorily prohibited with respect to a contract which is determinable in nature.

14. Thus, the learned Single Judge correctly declined to grant interim relief as sought for by the Appellant in view of Section 14(1)(c) read in conjunction with Section 41(e) of the Specific Relief Act, 1963.

15. For the aforesaid reasons, we find no merit in the present Appeal and the same is hereby dismissed, however, with no order as to costs.