

(2023) 04 CAL CK 0070
In the Calcutta High Court
Case No : W.P.A No. 3381 Of 2023

Subodh Kumar Singh Rathour

APPELLANT

Vs

Chief Executive Officer, Kolkata Metropolitan Development
Authority & Ors

RESPONDENT

Date of Decision : 24-04-2023

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g), 226

Citation : (2023) 04 CAL CK 0070

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Joydeep Kar, Vipul Kundulia, Siddhartha Lahiri, Debraj Dutta, Kishore Dutta, Avishek Guha, Sirsanya Bandopadhyay, Akansha Chopra, Debarati Das

Final Decision : Dismissed

Judgement

Moushumi Bhattacharya, J

1. The petitioner claims to be a contractor engaged by the Kolkata Metropolitan Development Authority (KMDA) as the successful bidder in a tender floated by the KMDA for regular maintenance of the Beliaghata and Swabhumi underpasses including proper upkeep of the said underpasses. The petitioner has challenged an order dated 7.2.2023 passed by the Chief Engineer – II (Bridge), KMDA by which the KMDA cancelled the tender awarded to the petitioner and the petitioner seeks quashing of the same.

2. The petitioner, through learned counsel, says that the impugned action of cancellation is arbitrary and could not have been done in the face of a concluded contract between the parties. Counsel submits that the impugned cancellation has affected the petitioner's rights under Article 19(1)(g) of The Constitution of India and that the ground for cancellation is de hors the clauses of the contract. It is further submitted that the petitioner was not given a hearing before the impugned decision thereby amounting to a breach of the principles of natural

justice. Counsel submits that the petitioner has undertaken a substantial amount of work in erecting Unipoles and Gantries at Beliaghata and Swabhumi.

3. Learned counsel appearing for the respondents/KMDA takes a preliminary point of the writ petition not being maintainable on the ground that the challenge is devoid of any public law element. Counsel submits that the petitioner seeks enforcement of a non-statutory contract and the complaint is, at best, that of breach of contract. Counsel submits that the facts of the instant case would show that there is no statutory duty which has been imposed on the State respondents and further that the petitioner can seek to enforce its rights before a civil forum. It is further submitted that KMDA has taken an administrative decision to not proceed any further with the tender as that would lead to further loss of revenue for the Authority.

4. The controversy in the present writ petition rests on the letter of KMDA dated 7.2.2023 by which the work/tender given to the petitioner was cancelled. The reason given for the impugned cancellation is that the tender has been found to have "technical fault, non-specific and not well defined thus creating ambiguity for obvious reasons". The other reason given is that the authority is incurring financial losses as a result of the tender. The letter of cancellation was preceded by a letter of 24.1.2023 from KMDA to the petitioner requesting the petitioner to stop all kinds of site activities with immediate effect until further notice. The reason given for the stop-work request is of a changed scenario of the maintenance activity of the E.M. Bypass being handed over from the KMDA to KMC.

5. The reason given for the stop-work would also be evident from an Order dated 1.12.2022 of the Urban Development and Municipal Affairs Department, Government of West Bengal which states that the maintenance of the E.M. Bypass which connects the northern and southern parts of the city of Kolkata, (starting from Ultadanga to Garia and running around the eastern ring of the city) will be handed over from KMDA to KMC, including certain activities mentioned in the Order.

6. The Company, M/s VS Advertising of which the petitioner is the sole-proprietor, emerged as the successful bidder in terms of the bid document floated by KMDA. KMDA issued Letters of Acceptance (Intent) in favour of M/s. VS Advertising on 27.6.2022 for the regular maintenance of Beliaghata and Swabhumi underpasses referring to the quoted amount, the earnest money, the tender number as well as the period of the license. Clause 4 of the letter states that the document shall be treated as the Letter of Intent and shall constitute a part of the contract agreement. Clause 12 also refers to the "contract documents".

7. KMDA thereafter issued the work orders to M/s V.S. Advertising on 18.10.2022 for the work of regular maintenance of Beliaghata/Swabhumi Underpasses including up keeping of the same. The advertisement license amount for the first

year license period has been mentioned as Rs. 34,87,555/- and Rs. 27,79,555 respectively and clause 3 of the work orders state that the period of license for the work is 10 years. Clause 9 includes a detailed table of the scope of the work.

8. The documents make it clear that the KMDA entered into a contract with the petitioner's company for the period mentioned in the work orders and the petitioner performed part of the work in terms of the work order.

9. Thus, the question which must first be answered, on the preliminary objection raised by the respondents, is whether a writ of mandamus can be issued against the respondent KMDA for not enforcing its contractual obligations. If yes, the second question would be whether KMDA can terminate the contract on the grounds given in the impugned letter of cancellation without following the contractual obligations pre-termination.

10. With reference to the first question, the Order dated 1.12.2022 passed by the Urban Development and Municipal Affairs Department of the State makes it evident that the State took an administrative decision to hand over the maintenance of the E.M. Bypass, where the Beliaghata and the Swabhumi Underpasses were located, from the KMDA to KMC. Clauses 4 and 5 of the Order leave the right to collect revenues from the advertisement displays and custody of some of the existing structures with KMDA.

11. It is undisputed that the petitioner was given the license in respect of the Underpasses situated on the E.M. Bypass and would hence be covered by the Order dated 1.12.2022. The scope of clauses 4 and 5 of the order is restricted only to collection of revenue and custody of parts of the old/existing structures. The effect of the administrative decision was reiterated in the stop-work request of 24.1.2023 where the reason given for the stop-work was also the "changed scenario" of handover of the maintenance work of E.M. Bypass to KMC from KMDA. Hence, the reason for the stop-work and the impugned cancellation is a change of policy for administrative convenience simplicitor.

12. Thus, the argument of the petitioner that the respondent KMDA had failed to comply with its contractual obligations for termination cannot be sustained since the reason for termination is not what is contemplated under clause 35(ii) of the Special Terms and Conditions of the tender document - "defaults/deviances/omissions" - but an administrative decision taken by the State. Although both parties have raised disputes against each other in the matter of positioning of the advertisements, the KMDA has not taken any ground of default or omissions either in the stop-work notice or in the impugned cancellation. Therefore, the argument that the cancellation should fail for not having followed the contractual provisions cannot be accepted.

13. The relief sought for in the writ petition makes it evident that the petitioner seeks to continue with the contract. Admittedly, the petitioner has challenged the cancellation of an existing contract between the petitioner and KMDA. It is therefore clear that the petitioner seeks enforcement of the contractual terms

relating to the period of license which was initially fixed for 10 years. The petitioner accordingly seeks a direction on the respondents not to give effect to the impugned cancellation of the contract (prayer (e) of the writ petition).

14. The Supreme Court has pronounced numerous decisions on the limited role of a Writ Court in enforcing contractual obligations on the part of the State. *Lekhraj Sathramdas Lalvani v. N.M. Shah*, Deputy Custodian Cum Managing Officer, Bombay; AIR 1966 SC 334 is one of the earlier cases on the point where the Supreme Court held that the chief function of a Writ Court is to compel the performance of public duties prescribed by statute and an obligation falling upon a public servant out of a contract cannot be enforced by the machinery of a writ under Article 226 of the Constitution. In *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh*; (1977) 4 SCC 145, it was held that a writ of mandamus can only be granted where a statutory duty has been imposed upon the concerned officer and there is a failure on the part of that officer to discharge the statutory obligation. In *Joshi Technologies International Inc. v. Union of India*; (2015) 7 SCC 728, the Supreme Court relied on *Divl. Forest Officer v. Bishwanath Tea Co. Ltd.*; (1981) 3 SCC 238 to hold that a writ petition will not be maintainable if a matter is governed by a contract since the relief under Article 226 is not available in the private law field. The Supreme Court came to a similar conclusion in *Bharat Coking Coal Limited v. AMR Dev Prabha*; (2020) 16 SCC 759 where the decision in *Jagdish Mandal v. State of Orissa*; (2007) 14 SCC 517 was relied upon and it was held that constitutional courts are concerned only with the lawfulness of a decision and not its soundness. The Supreme Court proceeded to hold that Courts ought not to sit in appeal over decisions of executive authorities and that the State should be given latitude in exercise of executive power.

15. Therefore, the uniform view appears to be of a hands-off approach to disputes arising out of a contract even where the challenge is to a State action. The recent decision of the Supreme Court in *MP Power Management Company Limited, Jabalpur v. Sky Power Southeast Solar India Private Limited and Ors.*; (2023) 2 SCC 703 noted the remarkable expansion of the frontiers of the Court's jurisdiction to question State action in contractual matters. The position was however clarified with reference to the consideration being based on particular facts of each case and restricted to those matters where State action is per se arbitrary. The unerring conclusion is that a Writ Court should keep matters of contract at a distance unless the action impugned reaches the benchmark of arbitrary and unreasonable overreach of the executive mandate.

16. The above discussion directs the question as to whether the impugned cancellation satisfies the test of arbitrariness so as to invite the interference of the Writ Court.

17. In *MP Power*, an arbitrary act was defined as that which betrays caprice or an exhibition of whim without the support of rationale or legal thinking. An arbitrary act may also lack good faith or involve an oblique motive. The act may even

display non-application of mind without due regard to the rights that would be affected or the consequences which would follow therefrom. Simply put, an arbitrary act or action would be that which is wholly unreasonable, irrational and one which cannot be justified by clear, straight thinking. The logic, in such acts, runs amok.

18. In the present case, the impugned cancellation of 7.2.2023 cannot be described as a bolt from the blue since the petitioner was put on notice of the impending change in circumstance on 24.1.2023 where the reason for the change was also conveyed to the petitioner. The order dated 1.12.2022 of the Urban Development and Municipal Affairs Department stating that the maintenance of the E.M. Bypass would be handed over from the KMDA to KMC provides the rationale for the impugned cancellation. Seen in this backdrop, it cannot be said that the impugned letter of cancellation of the tender/work was issued with an ulterior motive or for extraneous considerations. In fact, the letter of cancellation provides further reasons, namely, that the tender has been found to be non-specific and having technical faults. This would also be borne out from clauses 10 and 14 of the Special Terms and Conditions of the tender document which give rise to conflicting interpretations on the placement of the signboards. Hence, besides the administrative decision to hand over the maintenance of E.M. Bypass from KMDA to KMC, the respondent KMDA as the tendering authority, has a right to rectify the ambiguities in the bid document by cancelling the same.

19. Moreover, the alleged arbitrariness in the impugned letter of cancellation is further diluted since the respondent KMDA has offered to reimburse the cost incurred by the petitioner in performing the work, including refund of the license fee and the actual cost incurred for the construction activity and maintenance work on an assessment being done by the divisional engineers. The fairness of the respondent's stand cannot be equated with arbitrary or unreasonable State action.

20. It is well settled that a contractual dispute with a public law element would be amenable to writ jurisdiction. The present dispute however arises out of a private contract for maintenance of underpasses in the E.M. Bypass and advertisement rights over certain spaces within the contracted area. The rights following out of the contract are purely private in nature and there is nothing to show that the performance of the contract or the consequence therefrom would affect the public at large or even a sizeable section of the public. A public law element is generally understood to mean the reach of an obligation to a large section of the public or the obligation affecting the lives and livelihood of the general public by its very nature. M.P. Power sounded a cautionary note in such cases where the State cites monetary gains or losses as reason for termination of a contract. This is also not the case at hand since the reasons given for cancellation were on a wholly different plane.

21. The above reasons persuade this Court to hold that the remedy available to the petitioner is in the realm of private law and not under Article 226 of the

Constitution which contemplates certain tests including that the dispute must have a public law element. The complaint of the petitioner is essentially for the specific performance of the contractual obligation of the respondent KMDA. Doubtless, the petitioner can avail of appropriate civil remedies for redress which would include damages for breach of the contractual terms.

22. The decisions cited on behalf of the petitioner cannot be called to question in terms of the principle laid down. In *Sanchit Bansal v. Joint Admission Board*; (2012) 1 SCC 157, an arbitrary action was described as one where the authority disregards individual discussion and ignores prescribed rules, and procedure of law. *State of U.P v. Sudhir Kumar Singh*; (2020) SCC OnLine SC 847 dealt with the principle of natural justice and the right of being heard. As stated above, since the impugned cancellation was not a result of breach of contractual terms, the procedure provided for termination was not required to be followed. *Vice Chairman & Managing Director, City and Industrial Development Corporation of Maharashtra Ltd. v. Shishir Realty Private Limited*; (2021) SCC OnLine SC 1141 warned against the termination of contract by the State on the ground of loss of public money. This also cannot be applied to the present case. In *Harbanslal Sahnia v. Indian Oil Corpn. Ltd.*; (2003) 2 SCC 107 and *Uttar Pradesh Power Transmission Corporation Limited v. CG Power and Industrial Solutions Limited*; (2021) 6 SCC 15 the Supreme Court held that the availability of an alternative remedy would not prohibit the High Court from entertaining a Writ Petition in appropriate cases.

23. A writ of mandamus can be issued where a statutory duty has been imposed upon the concerned Officer/State authority and where there has been a failure on the part of that authority to discharge the statutory obligation. The Writ Court steps in such case to compel the authority to perform the obligation so as to protect the right of an aggrieved party to seek redress. The petitioner has not been able to show any statutory duty on the part of the respondent KMDA in the face of the changed circumstances resulting from an administrative decision which shifts the control to a different authority altogether. The offer of the respondent KMDA to compensate the petitioner for all the work undertaken and refund of the license fee further absolves the respondent KMDA of any charge of arbitrariness or unreasonableness.

24. This Court does not find any basis to exercise the discretionary jurisdiction under Article 226 of the Constitution of India. WPA 3381 of 2023 is accordingly dismissed on the ground of maintainability. There shall not be any order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.