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

+ **W.P.(C) 5840/2019 & CM APPLN. No.25477/2019**

M/S APANA LOGISTICS PVT. LTD. Petitioner

Through Mr. Rakesh Tiku, Sr. Adv. with
Ms. Meenu Pandey and Mr.
Gaurav Kohli, Advs.

versus

CONTAINER CORPORATION OF INDIA LTD. AND ANR.
..... Respondents

Through Mr. Rajinder Dhawan and Mr.
B. S. Rana, Advs.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **24.05.2019**

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, impugning a communication dated 08.04.2019 issued by the respondents (hereafter referred to as "CONCOR"), terminating the contract for handling of containers awarded to the petitioner. It is the petitioner's case that the termination is illegal and arbitrary.

2. On 25.11.2016, CONCOR had issued a notice inviting e-tender for Handling Containers at CFS, Dronagiri by reverse auction. The petitioner had participated in the said tender process and was declared successful. On 03.03.2017, a Letter of Intent was issued to the petitioner. Subsequently, on 01.04.2017, the petitioner had entered into an agreement (hereafter 'the Contract') to act as a terminal handling contractor for the respondents at Dronagiri.

3. It is the petitioner's case that pursuant to the said tender, it had purchased the necessary equipment to execute the contract and had incurred an expenditure of ₹10,17,000/-.

4. Subsequently however, on 28.01.2019, the petitioner had received a letter from CONCOR informing the petitioner that it would be deploying Reach Various Stacker (RST) machines owned by it at various terminals and therefore, such activities would be taken over by it. Thereafter, the petitioner received a letter dated 13.02.2019 eliciting the petitioner's response whether it was willing to operate a part of the Contract relating to 'Internal Transportation of Containers at CSF-DRT' which, according to CONCOR, was part of the scope of the Contract.

5. The petitioner responded to the said letter, *inter alia*, lodging its protest against the said decision and further requesting that they be permitted to deploy 50% of the RSTs. The petitioner also claimed that the said notices were in violation of the Contract entered into between the parties. It is apparent from the said letter that the petitioner was not interested in taking up the work of Internal Transportation of Containers at CFS-DRT.

6. There is some controversy as to whether this procedure was included within the scope of work under the Contract. Whereas the petitioner contends that it was not part of the contract awarded to the petitioner, CONCOR disputes the same and asserts that the said procedure was also included in the scope of the work awarded to the petitioner under the Contract. Be that as it may, there is no dispute that the petitioner was not willing to undertake the said work at that time,

nor is it currently interested in doing so.

7. Thereafter on 08.04.2019, CONCOR issued a letter informing the petitioner that in terms of Clause 19 of the Contract, CONCOR was terminating the contract and the said letter be treated as a notice of termination under Clause 19 of the Contract. The said notice of termination has been impugned in the present petition.

8. Before proceeding further, it would be relevant to refer to Clause 19 of the said Contract which reads as under:

“19. EXIT CLAUSE

CONCOR will have the liberty to terminate the contract by giving an advance notice of (60) sixty days in case there are strong business reasons for it to do so as determined by its management,”

9. It is clear from the above that the said Clause enables CONCOR to terminate the Contract by giving a prior notice of 60 days in case there are *strong business reasons for it do so as determined by its management*. According to CONCOR, there are strong business reasons for terminating the Contract and its management has exercised its option under the said Exit Clause. The petitioner contests the same and asserts that there are no strong business reasons for doing so.

10. It is apparent from the above that the controversy involved in the present petition relates to the scope and interpretation of the Contract between the parties. Such a dispute is in the realm of private law and this Court is unable to accept that there is any element of public law involved. This Court is, *prima facie*, of the view that the question whether there are strong business reasons would be as perceived by the

management of CONCOR and it is not open to judicial review in these proceedings.

11. It is also relevant to note that the Contract between the parties includes an Arbitration Clause and the learned counsel appearing for CONCOR submits that the dispute raised by the petitioner squarely falls within the scope of the said Clause.

12. Mr. Tiku, the learned Senior Counsel appearing for the petitioner referred to the decision of the Supreme Court in *Harbanslal Sahnia and Anr. v. Indian Oil Corporation. Ltd. And Ors.: AIR (2003) SC 2120*, and on the strength of the same, contended that an Arbitration Clause would not preclude this Court from exercising its jurisdiction under Article 226 of the Constitution of India. The said proposition cannot be faulted with. Plainly, existence of an arbitration agreement does not denude this Court of its jurisdiction under Article 226 of the Constitution of India. However, the courts must be circumspect in exercising such jurisdiction and do so only where an element of public law is involved and where the actions of the state fall foul of the Wednesbury principle, that is, no reasonable person could possibly take such a decision.

13. In *Joshi Technologies International Inc. v. Union of India: (2015) 7 SCC 728*, the Supreme Court summarised the scope of judicial review in contractual matters and held as under:

“69. The position thus summarised in the aforesaid principles has to be understood in the context of discussion that preceded which we have pointed out above. As per this, no doubt, there is no absolute bar to the maintainability of the writ petition even in contractual

matters or where there are disputed questions of fact or even when monetary claim is raised. At the same time, discretion lies with the High Court which under certain circumstances, it can refuse to exercise. It also follows that under the following circumstances, “normally”, the Court would not exercise such a discretion:

69.1. The Court may not examine the issue unless the action has some public law character attached to it.

69.2. Whenever a particular mode of settlement of dispute is provided in the contract, the High Court would refuse to exercise its discretion under Article 226 of the Constitution and relegate the party to the said mode of settlement, particularly when settlement of disputes is to be resorted to through the means of arbitration.

69.3. If there are very serious disputed questions of fact which are of complex nature and require oral evidence for their determination.

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70. Further, the legal position which emerges from various judgments of this Court dealing with different situations/aspects relating to contracts entered into by the State/public authority with private parties, can be summarised as under:

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70.3. Even in cases where question is of choice or consideration of competing claims before entering into the field of contract, facts have to be investigated and found before the question of a violation of Article 14 of the Constitution could arise. If those facts are disputed and require assessment of evidence the correctness of which can only be tested satisfactorily by taking detailed evidence, involving examination and cross-examination of witnesses, the case could not be conveniently or satisfactorily decided in proceedings under Article 226 of the Constitution. In such cases the Court can direct the aggrieved party to resort to alternate remedy of civil suit, etc.

70.4. Writ jurisdiction of the High Court under Article

226 of the Constitution was not intended to facilitate avoidance of obligation voluntarily incurred.

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70.8. If the contract between private party and the State/instrumentality and/or agency of the State is under the realm of a private law and there is no element of public law, the normal course for the aggrieved party, is to invoke the remedies provided under ordinary civil law rather than approaching the High Court under Article 226 of the Constitution of India and invoking its extraordinary jurisdiction.”

14. In the present case, CONCOR has found no fault with the petitioner's performance of its obligations under the Contract and there is no allegation of any shortcoming in this regard. However, CONCOR has a contractual right to terminate the Contract in terms of Clause 19 of the Contract, even in cases whether there is no fault on the part of the petitioner. Although the petitioner disputes that the conditions for exercise of such rights exist, this Court is of the view that it would not be apposite for this Court to entertain such disputes in these proceedings.

15. Mr. Tiku also contended that the real cause of terminating the Contract was the reluctance of the petitioner for accepting the work of internal transportation. The said contention is unmerited. It is apparent from the communications placed on record that CONCOR has exercised its right to terminate the Contract under Clause 19 of the Contract for the reason that CONCOR had decided to deploy their own RSTs and not on account of petitioner declining to take other works.

16. The petition is accordingly dismissed leaving it open for the petitioner to avail all remedies available in law. The pending

application also stands disposed of.

VIBHU BAKHRU, J

MAY 24, 2019
DR

HIGH COURT OF DELHI



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