

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 4TH DAY OF OCTOBER, 2023

BEFORE

THE HON'BLE MR. JUSTICE KRISHNA S.DIXIT

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WRIT PETITION NO.2940 OF 2023 (GM-TEN)

BETWEEN:

H.N.PRUTHIVINARAYAN,
S/O H G NARAYANA,
AGED ABOUT 52 YEARS,
NO 65/14, P. B. NO. 32,
B M ROAD, HASSAN 573 201.

...PETITIONER

(BY SMT.LAKSHMY IYENGAR., SENIOR COUNSEL A/W
SRI. VENKATARAMANA K S., ADVOCATE)

AND:

1. THE MANAGING DIRECTOR,
KSRTC, CENTRAL OFFICER,
SHANTHINAGARA,
BENGALURU 560 027.

2. THE DIVISIONAL CONTROLLER,
KSRTC, HASSAN DIVISION,
HASSAN 573 201.

...RESPONDENTS

(BY SRI.P D SURANA., ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO QUASHING THE IMPUGNED E-TENDER NOTIFICATION DATED 10/01/2023 IN NO.KARASA.HAVI.SAM.VAA/1868/22-23 ISSUED BY R-2 VIDE ANNEXURE-G AND DIRECTING THE RESPONDENTS TO CONSIDER THE REPRESENTATIONS DATED 18/11/2022, 18/01/2023 VIDE ANNEXURE-F AND F1.

THIS PETITION HAVING BEEN HEARD AND RESERVED FOR ORDER, THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

Petitioner, claiming to be an ongoing contractor, is tapping the writ jurisdiction of this Court for assailing the Notification dated 10.01.2023 issued by the 2nd respondent at Annexure-G calling for e-Tender *inter alia* in respect of commercial complexes in the KSRTC bus stand at Hassan. The *habendum* of the said tender in colloquial reads as under:

"ಇ-ಟೆಂಡರ್ ಪ್ರಕಟಣೆ ಸಂಖ್ಯೆ-06/2022-23

ಕರ್ನಾಟಕ ರಾಜ್ಯ ರಸ್ತೆ ಸಾರಿಗೆ ನಿಗಮ ಹಾಸನ ವಿಭಾಗದ ವ್ಯಾಪ್ತಿಗೆ ಸೇರಿದ ಹಾಸನ ಕೇಂದ್ರಿಯ ಬಸ್ ನಿಲ್ದಾಣದಲ್ಲಿ ಪ್ರಸ್ತುತ ಇರುವ ಏಕೈಕ ಪರವಾನಗಿದಾರರ ಪರವಾನಗಿ ಅವಧಿಯು ದಿ:31.03.2023 ಕ್ಕೆ ಕೊನೆಗೊಳ್ಳುತ್ತಿರುವುದರಿಂದ ದಿ:01.04.2023 ರಿಂದ ಅನ್ವಯವಾಗುವಂತೆ ಹಾಸನ ಕೇಂದ್ರಿಯ ಬಸ್ ನಿಲ್ದಾಣದಲ್ಲಿರುವ ಕಟ್ಟಿದ/ ತೆರದ ಸ್ಥಳದ ವಾಣಿಜ್ಯ ಮಳಿಗೆ, ದ್ವಿಚಕ್ರ/ನಾಲ್ಕು ಚಕ್ರ ಪಾರ್ಕಿಂಗ್‌ಗಳಿಗೆ, 03, 05, 10 ವರ್ಷದ ಅವಧಿಗೆ ಪರವಾನಗಿಯ ಆಧಾರದ ಮಡಲೆ (ಪ್ರತಿ ವರ್ಷ 10% ರಷ್ಟು ಪರವಾನಗಿ ಶುಲ್ಕದ ಹುಚ್ಚಳದೊಂದಿಗೆ) ಪರವಾನಗಿದಾರರನ್ನು ಆಯ್ಕೆ ಮಾಡಲು ಇ-ಟೆಂಡರ್ ಪ್ರಕ್ರಿಯೆಯ ಮೂಲಕ ಅಸಕ್ತರಿಂದ ಅರ್ಜಿಗಳನ್ನು ಆಹ್ವಾನಿಸಲಾಗಿರುತ್ತದೆ. ಇಚ್ಛೆಯುಳ್ಳವರು ಸಂಬಂಧಿಸಿದ ಮಳಿಗೆಗಳ ಮುಂದೆ ಸೂಚಿಸಿರುವ ಇ.ಎಂ.ಡಿ. ಮೋತವನ್ನು ಡಿಡಿ ಮೂಲಕ "Divisional Controller KSRTC Hassan Division" ಹೆಸರಿನಲ್ಲಿ ಪಾವತಿಸುವುದು. ಪ್ರಕಟಣೆಗಳನ್ನು <https://eproc.karnataka.gov.in> & ksrtc.karnataka.gov.in ಅಂತರ್ಜಾಲದ ಮೂಲಕ ಡೌನ್‌ಲೋಡ್ ಮಾಡಿಕೊಳ್ಳಬಹುದು."

2. Learned Senior Advocate appearing for the Petitioner seeks to falter the tender in question on the ground of *force majeure* namely COVID-19 Pandemic; the

two Central Government Notifications dated 19.02.2020 & 13.05.2020 have the effect of elongating the twelve year contract period *pro tanto*; there is lapse on the part of respondents in discharging certain contractual obligations briefly stated in para 5 of the petition, despite representations; Petitioner had filed a few cases such as W.P.No.30258/2018, C.M.P No.233/2018, W.P.No.8992/2021, W.P.No.16705/2022 (respondents W.A.No.27/2023); bifurcation of subject matter of tender is unsustainable; impugned action defeats legitimate expectation; Petitioner has got right of extension of the contract; there being an ongoing arbitration, without its culmination into an award, the impugned tender could not have been flouted. The counsel relied upon certain Rulings in support of these submissions.

3. Learned Panel Counsel appearing for the Respondents resisted the Writ Petition repelling the submission made on behalf of the Petitioner. The Statement of Objections have been filed on 14.03.2023 opposing the Writ Petition; the allegations of non-

performance of contractual obligations are denied; petition is misconceived, an arbitrator having been appointed; Petitioner's submission transcends the parameters fixed by the Apex Court in the CAs referred to *infra*; Petitioner has committed breach of contract and in any way the contract has come to an end by efflux of time; respondents being the owners of the premises in question have a greater leverage in awarding contracts and the arguable split of the items cannot be found fault with; Article 39(b) & (c) of the Constitution would support such a split; matter having ultimately gone in C.A.Nos.3625 and 3623-3624/2023, the observations made by the Apex Court in its order dated 8.5.2023 are pressed into service. The Panel Counsel cited certain Rulings in support of his contentions.

4. Having heard the learned counsel for the parties and having perused the Petition papers, this court grants partial indulgence in the matter for the following reasons:

(a) Petitioner has been operating the contract in question and its twelve year tenure was from 1.2.2011 to

31.1.2023 are not in dispute, the same being a matter of record. The first submission of learned Sr. Advocate appearing for the Petitioner that the tenure of the contract should be elongated by the COVID-19 Pandemic period in the light of two Central Government Notifications dated 19.2.2020 & 13.5.2020 has some force. During the pandemic, almost all commercial activities had come to a standstill world over, cannot be much disputed. That is how, the said Notifications came to be issued. Even the Apex Court in *suo moto* proceedings, extended the periods of limitation in *suo moto* W.P.No.(c) 3/2020 *in re:* cognizance for extension of limitation vide Misc. Application No.665/2021 and Misc. Application No.21/2022, because of unprecedented situation generated by the COVID-19 Pandemic. This extension was from 15.3.2020 to 28.2.2022. Arithmetically this period is two years minus fifteen days. If this period is added to the prescribed tenure of the contract between the parties, the same would stand extended till 16.1.2025 and half of the said period is reckoned, that would come to 9.1.2024. If

that be so, the impugned e-tender could not have been issued.

(b) Let me examine the very concept of *force majeure*. McCardie J. in *Lebeaupin v. Crispin* ([1920] 2 K.B. 714), has given an account of what is meant by "force majeure" with reference to its history:

"...The expression "force majeure" is not a mere French version of the Latin expression "vis major". It is undoubtedly a term of wider import. Difficulties have arisen in the past as to what could legitimately be included in "force majeure". Judges have agreed that strikes, breakdown of machinery, which, though normally not included in "vis major" are included in "force majeure". An analysis of rulings on the subject into which it is not necessary in this case to go, shows that where reference is made to "force majeure", the intention is to save the performing party from the consequences of anything over which he has no control. This is the widest meaning that can be given to "force majeure", and even if this be the meaning, it is obvious that the condition about "force majeure" in the agreement was not vague. The use of the word "usual" makes all the difference, and the meaning of the condition may be made certain by evidence about a force majeure clause, which was in contemplation of parties..."

This English decision has got the imprimatur of the Apex Court in ***DHANRAJAMAL GOBINDRAM VS SHAMJI KALIDAS AND CO***, AIR 1961 SC 1285. Added, the Delhi High Court in ***M/S HALIBURTON OFFSHORE SERVICES INC. VS. VEDANTA LIMITED***, 2020 SCC OnLine Del 542

having referred **ENERGY WATCHDOG vs. CENTRAL ELECTRICITY REGULATORY COMMISSION**, (2017) 14

SCC 80, has observed as under:

"...It is under this factual backdrop that the ground of Force Majeure taken in March, 2020 would have to be adjudged. The grounds taken to invoke the Force Majeure clause are that due to outbreak of COVID-19 experts from France who may be required cannot travel to India. Since the Force Majeure clause in the contract covers epidemics and pandemics, the Contractor claims that its non-performance is justified and the invocation of Bank Guarantees is liable to be stayed. There is no doubt that COVID-19 is a Force Majeure event..."

What the Apex Court observed in **PRAVASI LEGAL CELL vs. UNION OF INDIA**, 2020 SCC OnLine SC 799 assumes significance: *"...The pandemic situation of COVID-19, has adversely affected the economy globally, in several sectors. Our country- India – and civil aviation sector is not an exception to the same..."*

The above position of law indisputably comes to the aid of Petitioner.

(c) The above being said, there is force in the submission of learned Panel Counsel appearing for the respondents that whether the petitioner is entitled to

extension of the contract by way of renewal on account of the very terms cannot be examined by this court, the same being litigated in the arbitration. This court hastens to clear that the extension of contractual period on account of *vis major* is one thing and renewal of contractual period, is another. What is discussed in the immediately preceding paragraph refers to the former and what is stated in this paragraph refers to the latter. Similarly, the question whether the respondent-KSRTC has not performed the contractual obligations resting on its shoulders cannot be examined by this court. However, it is not to say that an arbitration clause *per se* would oust the constitutional jurisdiction of this court vide ***U.P. POWER TRANSMISSION CORPORATION LTD., Vs. C G POWER & INDUSTRIAL SOLUTIONS LTD, AIR 2021 OnLine SC 243***. Therefore, these are the issues which the parties have to thrash out in the arbitration proceedings.

(d) The vehement submission of learned Panel Counsel for the Respondents that the Apex Court order dated 8.5.2023 in C.A.Nos.3625 and 3623-3624/2023 has

reduced the scope of the petition at hands and therefore, the Petitioner be relegated to arbitration, is bit difficult to countenance. In support of his contention, he pressed into service paragraphs 3 & 4 of the order which read:

"It is open to the writ petitioner i.e. H.N.Pruthvinarayan to question the terms of the tender conditions which in its pinion are objectionable in law...None of the directions in (1), (2) and (3) above shall be construed as in any manner preventing the appellant - Kerala State Road Transport Corporation from processing and proceeding ahead with the tender notice issued by it".

What the said counsel loses sight of is the preceding portion of the order namely paragraph (2) which has the following text:

"It is open to the respondent (s)/writ petitioner(s) to seek such remedies as are available in law including but not confined to compensation or damages for the period it was unable to operate, in the arbitration proceeding. Further, it is also open to the writ petitioner(s) to seek such remedies as are available in respect of the demand raised against it by the appellant(s) - Corporation. All rights and contentions of the parties in this regard are kept open."

What one is construing is not a statute but a judgment of the Apex Court of the country rendered in a set of facts and their penumbra. It hardly needs to be stated that

construing a judgment and interpreting a statute are two different exercises vide **COMMISSIONER OF CENTRAL EXCISE vs. SRIKUMAR AGENCIES**, 2008 (232) E.L.T. 577. What is stated in paragraphs 3 & 4 of the Apex Court order, if read in isolation, arguably the Panel Counsel could have been right. However, these paragraphs are preceded by paragraph No.2 and therefore, all the three paragraphs need to be construed in harmony with each other, as rightly contended by learned Sr. Advocate representing the Petitioner. If viewed that way, the sectarian argument of the Panel Counsel does not merit acceptance. A contra argument would render what is stated in paragraph No.2 meaningless to the detriment of the citizen and therefore, is not acceptable. Added, if contention of the Panel Counsel were to be true, the Apex Court would not have remanded the matter for consideration afresh, with the observation "*Learned Single Judge shall decide the challenge to the tender conditions having regard to the complaint against it by the writ petitioner(s), in W.P.No.2940/2023.*"

(e) This court does not much cotton with the contention of learned Panel Counsel appearing for the Respondents that as a Thumb Rule, in contractual matters involving tender process, the examination of the issues cannot be undertaken. A host of factors enter the fray in invoking a broad proposition of the kind. In what kind of cases, a Writ Court should grant interference is discussed by the Apex Court in a catena of decisions. What is reiterated in **M/s OM GURUSAI CONSTRUCTION COMPANY vs. M/s V.N.REDDY**, 2023 SCC OnLine SC 1051 at paragraph 33, assumes significance:

"...Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226 ..."

(f) The case of the Petitioner squarely fits into the proposition structured in the form of first question in **OM GURUSAI** supra. No reasonable person would have treated the tenure of the contract as having come to an end on 31.1.2023 when obviously the period of pandemic ought to have added to the benefit of the Petitioner. Just for an askance, a worthy petition cannot be thrown away chanting the alternate remedy as the *mantra*. One has to keep in mind no litigant comes to the Court with joy in heart. A Court litigation is not a luxury; it costs in terms of time & money if not more. Turning away an injured litigant, on the basis of some jurisprudential theory would shake the confidence of right thinking people in the judicial process. That would not augur well to the public interest, in the long run. More than a century ago, Justice Holmes of U.S. Supreme Court had said in **DAVIS vs. MILLS**, 194 U.S. 451, 457 (1904) is worth ruminating:

"Constitutions are intended to preserve practical and substantial rights, not to maintain theories."

Even the Apex Court in **RAPID METRORAIL GURGAON LIMITED vs. HARYANA MASS RAPID TRANSPORT**

CORPORATION LIMITED: 2021 SCC OnLine SC 269 reiterated: "...However, access to justice by way of public law remedy would not be denied when a lis involves public law character and when the forum chosen by the parties would not be in a position to grant appropriate relief..."

(g) AS TO ADJUSTING THE COMPETING INTERESTS OF PARTIES:

The impugned e-Tender was given partial effect and some portions of the premises having been auctioned are allotted to successful bidders already. A part of the premises is stated to be kept in lock & key of the second respondent. In view of this Petition being allowed in part, some adjustment has to be made so that none is put to much prejudice, on the lines as discussed below:

(i) The court has to strike a golden balance between the competing claims of the parties at loggerhead. Whatever interim protection by way of *status quo* was given to the petitioner should continue subject to whatever has been already done by the respondent-KSRTC, in the meanwhile. In other words, if the tender in question is already operated in part, the same is liable to be left undisturbed till after and subject to the outcome of

arbitration proceedings, inasmuch as, some third party interest appears to have been created. By this adjustment, whatever little prejudice that may be arguably occasioned to the parties, can be mitigated in a just way. Court has also kept in mind the institution of arbitral proceedings, wherein certain equities also can be worked out. While devising this, wisdom is drawn from the following observations of the Apex Court in: ***M/s SUNEJA TOWERS PRIVATE LIMITED vs. ANITA MERCHANT, 2023 SCC OnLine SC 443:***

"...We are cognizant of the prevailing market conditions as a result of Covid-19 Pandemic, which have greatly impacted the construction industry. In these circumstances, it is necessary to balance the competing interest of both parties..."

(ii) The above wisdom apart, utilitarian justice broadly requires that the institutions do endeavor something to mitigate distributional imbalances because there is a wider array of goods & services to satisfy preferences whereby selecting policies with the greatest net-benefit, effectively serves the interest of public at large. It hardly needs to be stated that in matters like this, there are other vital stakeholders namely, the commuters. The Nobel Laureate Amartya Sen in his *"Idea of Justice"* (London:Allen Lane, 2009) at page 395 writes:

"... Judgments about justice have to take on board the task of accommodating different kinds of reasons and evaluative concerns. The recognition that we can often prioritize and

order the relative importance of competing considerations does not, however, indicate that alternative scenarios can always be completely ordered, even by the same person.”

(h) Learned advocates appearing for the parties had relied upon certain decisions during the course of their arguments. However, they have not been in so many words referred to in the course of judgment since the latest views of the Apex Court on the same points avail and that the same are discussed. This is being stated only to pre-empt the possible complaint that the Rulings cited at the Bar are not adverted to.

In the above circumstances, this Writ Petition succeeds in part; the impugned e-tender Notification shall not be given effect to till after and subject to outcome of the arbitration proceedings that are stated to have been instituted this day; the said proceedings shall be accomplished by passing the award preferably within a period of three months. All contentions of the parties are kept open, and nothing observed herein above shall cast their light or shadow on the arbitration proceedings.

The premises that are already allotted to third parties pursuant impugned e-Tender Notification shall not be disturbed by the Petitioner and the premises that are not so let out, shall be handed to the Petitioner immediately after he deposits with the second Respondent one year advance rent/license fee at the enhanced rate under the existing arrangement.

This Court places on record its deep appreciation for the able assistance rendered by the Law Clerks cum Research Assistants Mr.Sourabh Roy and Mr.Raghunandan K S.

Costs made easy.

Sd/-
JUDGE

cbc