IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19597 of 2021

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M/S. OVERSEAS HEALTHCARE PVT. LTD.

Versus

STATE OF GUJARAT

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Appearance:
MR SHALIN MEHTA, SENIOR ADVOCATE WITH MR SAURIN A MEHTA(470) for the Petitioner(s) No. 1,2
MR KRISHAL H PATEL(9644) for the Petitioner(s) No. 1,2
MR KM ANTANI, ASST. GOVERNMENT PLEADER for Respondent No. 1
MR MITUL SHELAT WITH MS DISHA NANAVATY for Respondent No. 2

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CORAM:**HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH J. SHASTRI

Date : 07/07/2022
CAV JUDGMENT
(PER : HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR)

1. Petitioner has sought for the following reliefs :

> *"A. Your Lordship may be pleased to admit and allow this petition;*
>
> *B. Your Lordships may be pleased to issue a Writ of Mandamus or a Writ in the nature of Mandamus, or any other appropriate writ, order or direction, quashing and setting aside the impugned Risk Purchase Recovery Orders annexed at Annexure-A (Colly.) of the petition issued by respondent No.2 as the same being arbitrary, illegal and dehors the terms and conditions of the tender, terms and conditions for Acceptance Letter, Agreement dated 28.11.2018 and Rate Contract dated 01.05.2019;"*

2. Brief background of the case are :

2.1 Second respondent having monopoly in the State of Gujarat to procure and supply drugs and surgical items to the Government hospitals throughout the State of Gujarat, invited online tender on 17.04.2018 from manufacturers/direct importers for purchase of tablets, capsules, injection, miscellaneous and surgical items. In response to the same, petitioner submitted its tender for Item Code No.1071 i.e. '**Droxycycline Capsules 100mg**' by submitting its technical and commercial bid. On account of petitioner not being L1, it was awarded the tender as substitute rate contract-holder ('**SRCH**' for short) which came to be accepted by Acceptance Letter dated 10.10.2018. Pursuant to the same, an Agreement came to be entered into between petitioner and respondent No.2 on 28.11.2018. Petitioner was required to supply the subject tablets on agreed contract rate as per delivery instructions upto 30.09.2020 for 100% quantity in case the required quantity was not supplied by L1 bidder. The second respondent was also entitled to extend the tenure by a period of six months which was

extended upto 31.03.2021.

2.2 As L1 bidder failed to supply the required quantity of tablets, second respondent placed purchase orders on the petitioner who is the substitute rate contractor as per the terms of the Agreement dated 28.11.2018. Several purchase orders were placed commencing from January, 2020 to November, 2020 and petitioner did not adhere to any of the purchase orders and did not supply tablets. However, petitioner did not supply 1713 box of Droxycycline Capsules 100 mg on or before 06.03.2020 as per purchase order dated 07.01.2020. Hence, second respondent issued risk purchase notice dated 26.03.2020 to the petitioner. Even subsequent purchase orders placed during June, 2020, October, 2020 and November, 2020, petitioner did not supply. However, petitioner attempted to take umbrage for non-supply on the ground of large scale spread of Covid-19. There was considerable adverse effect on the pharmaceutical industry and there was disruption of supply chain and as such petitioner claims that it could not comply with the risk purchase requisition orders

issued by the second respondent. As such, risk purchase notices were issued to the petitioner by the second respondent which was replied by petitioner by taking umbrage under force majeure clause and also contending their obligations under the agreement had come to an end and petitioner was not obliged to supply the capsules. Hence, contending that for purchasing the product from open market, second respondent has not followed any procedure nor offered to purchase from other unsuccessful bidders and as such the risk purchase recovery orders, Annexure-A (collectively) has been impugned in the present Special Civil Application by the writ applicant.

3. The second respondent on being notified has appeared and filed its reply denying the averments made in the petition except to the extent expressly admitting certain facts. It is contended that writ petition arose out of a contract and same cannot be agitated before this Court in writ jurisdiction. It is contended that writ petition under Article 226 is not maintainable to seek alteration or nullification of contractual obligations.

Denying the averments made in the petition, respondent has sought for dismissal of the petition.

4. We have heard the arguments of Mr.Shalin Mehta, learned Senior Advocate appearing for the petitioner, Mr.K.M.Antani, learned Assistant Government Pleader appearing for respondent No.1 and Mr.Mitul Shelat, learned counsel appearing for respondent No.2.

5. It is the contention of Mr.Shalin Mehta, learned Senior Advocate that petitioner would not fall into the definition of 'contractor' and as such, Clause 5 of the tender document would not be applicable to him. He would draw the attention of the Court to Clause 6 to contend that said clause would be attracted and as such, impugned orders are liable to be quashed. He would also draw the attention of the Court to the notice dated 04.09.2020 issued by petitioner invoking the force majeure clause to contend that petitioner was prevented by the prevalent Covid pandemic which gripped the entire world and as a result of it there was disruption in chain supply and Government of India vide Office Memorandum dated 19.02.2020 had also clarified this

position. This fact was notified to the second respondent by the petitioner under the notice dated 04.09.2020 intimating thereunder that obligations of the petitioner had come to an end and petitioner was not obliged to supply the capsules.

6. He would submit that in complete ignorance of this notice dated 04.09.2020, second respondent again placed order during the month of October, 2020 and thereafter in November, 2020 and yet the second respondent issued the notice of risk purchase on 29.12.2020, Annexure-K (collectively) and the stand of the petitioner has been completely ignored by the second respondent by forwarding a frivolous reply dated 06.12.2021. He would submit that decision making process is flawed namely force majeure clause i.e. prevalent Covid pandemic in the world pleaded by the petitioner as a ground for non-adherence to its obligation for non-supply of the tablets has been completely ignored by the second respondent and this issue has not been examined by the respondent while invoking the risk purchase clause and as such, the decision making process

is flawed and prays for same being quashed. He would also submit that said order is in violation of Clause 5 to 7 of tender notification and Clause 7 which was required to be invoked before which Clause 6 ought to have been followed. He would also submit that second respondent ought to have considered the force majeure ground urged by the petitioner before passing the impugned order. He would submit that respondent ought to have approached L3, L4 and L5 instead of purchasing from open market. Hence, by relying upon the following judgments he prays for the petition being allowed :

> **(i) Vice Chairman and Managing Director, City and Industrial Development Corporation of Maharashtra Limited and another vs. Shishir Realty Private Limited and others,** reported in **2021 SCC Online SC 1141.**
>
> **(ii) ABL International Limited and another vs. Export Credit Guarantee Corporation of India Limited and others,** reported in **(2004) 3 SCC 553.**
>
> **(iii) Order dated 05.04.2022 passed in Adani Ports and Special Economic Zone Limited vs. Deendayal Port Trust (Formerly known as Kandla Port Trust), being Special Civil Application No.20161 of 2021.**
>
> **(iv) Cube Construction Engineering Limited Through Sanjay D. Shah, Director vs. State of Gujarat,** reported in **2021 Law Suit (Guj.) 5126.**

7. Per contra, Mr.Mitul Shelat, learned counsel appearing for the second respondent would support the impugned order and he would submit that challenge is only to the recovery notices but not to the purchase orders which according to the petitioner ought not to have been placed by the second respondent. He would further elaborate his submissions by contending that the dispute is in the realm of contractual obligations and as such, the Special Civil Application is not maintainable. In support of this proposition, he has relied upon the following judgments :

> **(i) State of Bihar and others vs. Jain Plastics and Chemicals Limited,** reported in **(2002) 1 SCC 216.**
>
> **(ii) State of U.P. and others vs. Bridge and Roof Company (India) Ltd.,** reported in **(1996) 6 SCC 22.**
>
> **(iii) Unreported judgment dated 30.07.2021 passed in M/s.Global S.S. Construction Private Limited vs. Chief General Manager (Mechanical-I/c. Sem.), being Special Civil Application No.11391 of 2020.**

8. He would further contend that reason for non-supply by the petitioner was on account of escalation of

prices and same cannot be a ground on which the contract can be frustrated. He would also submit that Clause 6 of the tender document is in addition to Clause 5 and contending that judgment of this Court relied upon by the petitioner in the matter of **Adani Ports and Special Economic Zone Limited,** there was a pre-contractual dispute which impugned order therein was passed in violation of principles of natural justice and as such, there is no infirmity in the impugned order passed in the instant case and as such he seeks for dismissal of this petition.

9. Having heard the learned advocates appearing for the parties and on perusal of the entire case-papers, we are of the considered view that following point would arise for our consideration :

> (i) Whether the impugned orders namely risk purchase recovery orders, Annexure-A (collectively) are liable to be quashed for any reason whatsoever ?

DISCUSSION AND FINDING ON ABOVE POINT :

10. The second respondent had floated a tender inquiry for supply of tablets, capsules, injection and

surgical items etc. and in the said tender process, petitioner herein participated and submitted its bid for Item Code No.1071 viz. supply of Droxycycline Capsules 100 mg. Petitioner was L2 bidder and his bid was accepted and petitioner was awarded substitute rate contract. The acceptance letter dated 10.10.2018 came to be issued and in furtherance of the same, an agreement dated 28.11.2018 was entered into between petitioner and second respondent. As per the terms of the agreement, petitioner was required to supply the tablets as agreed to under the contract, for the contract rate as per the delivery instructions upto 30.09.2020 as a substitute rate contractor for 100% quantity, in case the required quantity was not supplied by the L1 bidder. The second respondent was also empowered to extend the tenure for a further period of six months as per the agreement dated 28.11.2018 and accordingly, it was extended upto 31.03.2021.

11. On account of the L1 bidder’s failure to supply the requisite quantity of the tablets, the second respondent placed purchase orders with the petitioner as

substitute rate contractor as per the terms of the agreement and acceptance letter commencing from 07.01.2020 to 27.11.2020. However, petitioner did not make any supply in respect of any of the purchase orders and did not supply any tablets. In fact, by several communications commencing from 26.03.2020 to 29.01.2021, the second respondent intimated petitioner that it had failed to supply the tablets in terms of the purchase order and petitioner was notified that in the event of its failure to deliver the quantity within a stipulated time, it would impose penalty and action would be taken against the petitioner as per the contract without any further notice. However, petitioner sought for cancellation of the contract by contending that it had no obligation to comply with the orders placed by respondent in January, 2020.

12. It would not be out of place to refer at this juncture itself that when the first order was placed on 07.01.2020, there was no pandemic of Covid-19 and the lockdown was declared only on 23.03.2020 and when the country was facing the peak of pandemic. Petitioner had

showed its unwillingness to supply the tablets though during this period four purchase orders were placed by respondent. In fact, petitioner did not even care to reply to the same and only in the month of September - 2020, it expressed its unwillingness namely by communication dated 04.09.2020 under which petitioner sought for cancellation of the contract itself.

13. It is trite law that when the State or its instrumentality enters into a contract with the contractor or bidder, they would be governed by the terms of the contract and ordinarily both the parties would be governed by the law that governs the terms and conditions of the contract. In such circumstances, the acts of the State would not be amenable to the writ jurisdiction. This view also gets support from the judgment of the coordinate Bench rendered in the matter of **M/s.Global S.S. Construction Private Limited vs. Chief General Manager (Mechanical-I/c. Sem.) (supra)** disposed of on 30.07.2021 in Special Civil Application No.11391 of 2020 and connected matters whereunder the coordinate Bench has held :

"13. I say and submit that it is evident from the above facts that the petitioners have failed to perform the contract since C/SCA/11391/2020 JUDGMENT DATED: 30/07/2021 inception and are now trying to take advantage a force majeure clause in guise of nationwide lockdown between the 23.03.2020 to 21.05.2020. It is to state that as per clause No.23 of GCC, it has been agreed between the parties that a force majeure shall mean an Act of God, war, civil riots, fire, flood, directly affecting the performance of the contract. Under the said clause it is also to agree that the petitioner was required to give notice in writing for force majeure within 72 hours of beginning of such cause. Whereas in the instance case the lockdown was implemented by official order dated 23.03.2020 which was highly circulated in media and petitioner had claimed such force majeure after expiry of entire lockdown period by letter dated 29.05.2020.

ii) Moreover, as per Clause No.23, if the force majeure continued for more than a period two months, then ONGC had the option of cancelling the subject contract at its discretion without any liability. But in present case it is petitioner who had rescind the contract by its letter dt.29/05/2020.

iii) It is important to note that various other contractors who were engaged in operation and maintenance of the various other activities of the plant had continued to perform the contract even during the lockdown period also which proves that there was no real restriction for such essential services by the contractor.

Thus, the petitioner had failed to point out special equities or situation which had compelled the petitioner to not perform the subject contract since 2016 and also during the lock down period. The petitioner had also failed to provide any

reason for his nonperformance of the contract for a period prior to lockdown since awarding of the contract. Thus, the action initiated by ONGC against the petitioner is per the contractual provision and based on the unsatisfactory performance since awarding of the contract till the date of termination.

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38. What may be further noted is that at the first and the second stage of the contracts, when the government or any of its instrumentalities sets up the terms and conditions of the C/SCA/11391/2020 JUDGMENT DATED: 30/07/2021 contract or takes a decision to allot the contract, it acts purely in its executive capacity and its action is, therefore, open to judicial review, though in a limited way, as indicated hereinabove. However, when the third stage is reached and a contract is entered into by the government or its instrumentality, on the one hand, and the contractor, on the other, the parties are no longer governed by Constitutional provisions, but by the terms of the contract. Hence, when a State, purporting to act within the field allotted to it under the terms and conditions of a contract, performs an act, the rights and obligations of the parties would be, ordinarily, governed by the law that governs the terms and conditions of the contract. The mere fact that one of the parties to such a contract is the State or its instrumentality will not make a contract amenable to writ jurisdiction. (See Radhkrishna Agarwal v. State of Bihar (supra)).”

14. In the case of **State of Bihar and others vs. Jain Plastics and Chemicals Limited (supra)**, the Hon’ble Apex Court has held that writ is not remedy for

questioning contractual obligations. It has been further held :

> *"3. Settled law writ is not the remedy for enforcing contractual obligations. It is to be reiterated that writ petition under Article 226 is not the proper proceeding for adjudicating such disputes. Under the law, it was open to the respondent to approach the Court of competent jurisdiction for appropriate relief for breach of contract. It is settled law that when an alternative and equally efficacious remedy is open to the litigant, he should be required to pursue that remedy and not invoke the writ jurisdiction of the High Court. Equally, the existence of alternative remedy does not affect the jurisdiction of the Court to issue writ, but ordinarily that would be a good ground in refusing to exercise the discretion under Article 226."*

15. The Apex Court in the case of **State of U.P. and others vs. Bridge and Roof Company (India) Ltd. (supra)** has held :

> *"13. Mr. Rakesh Dwivedi, learned Additional Advocate General for the State of U.P.,urged the following contentions:-*
>
> *(1) Under the terms of the contract the tendered amount quoted by the respondent included sales Tax at 4%. The Government was under a statutory obligation to deduct this 4 per cent and remit the same to the sales Tax Department. The contractor was entitled only to the remaining 96 per cent of the contact amount since the rate of tax payable by the respondent-contractor has*

been reduced to one per cent from 4 per cent under an order of composition passed under Section 7-D, it is a situation attracting sub-clause (4) of clause 70 of the contract. According to it the benefit of any reduction in the rate of sales tax shall operate to the benefit of the Government just as any enhancement in the rate of sales tax would be a liability upon the Government. The Government was,therefore, justified in retaining the said amount of Rs.82,24,969/-.

(2) The direction of the high court to deduct only one per cent is a case of stating the obvious. But that order is being construed by the respondent an order allowing the writ petition as prayed for. If so understood, the order of the High court results in unjust enrichment of the respondent at the cost of public exchequer besides being contrary to the provisions of the statute and terms of the contract between the parties.

14. Shri A.K.Ganguli and Mr.Sudhir Chandra, learned advocates of the respondent, on the other hand,submitted that the Government is nit concerned with the sales tax liability of the respondent. That is a matter between the respondent and the sales tax Department. The obligation of the Government under the contract was only to deduct 4 per cent from the amount payable to the respondent under the contract. But since the said obligation to deduct has been reduced from 4 per cent to one per cent by an order made under the proviso to Section 8-D(1) the Government should deduct only at the rate of one per cent and pay over the balance of the contract amount rest to the respondent. The Government is not concerned with the order of composition made under Section 7-D(1).What all has happened under the composition order is that instead of ascertaining the value of the goods transferred in the execution of the work contract.

Counsel say that this has been done in the interest of simplication of assessment procedure and as a measure of government policy. This does not result in reduction in the rate of tax; it is only a convenient and simplified formula for quantifying the tax. Hence, they submit, there is no question of the Government getting the benefit of any reduction in the rate of tax.

15. In our opinion,the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e, in the writ petition filed by it. The High court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiteration the effect of the order of the Deputy commissioner made under the proviso to Section 8-D(1).”

16. Keeping the aforesaid authoritative principles of law enunciated by Apex Court in mind, when the facts on hand are examined, it would clearly emerge from records that under Clause 5(d) of the tender document, tenderers were notified that on their failure to supply risk purchase would be issued from main/parallel or substitute RC holder. The said clause reads as under :

*“**5. Risk Purchase** :- The risk purchase of the items ordered at the cost and risk of the party will be carried out when the party fails to :*

a) xxx

b) xxx

c) xxx

d) The Risk Purchase will be done from Main / Parallel or Substitute R.C. holder for undelivered quantity of the Stores and the Contractor shall be penalized to the extent of 10% or difference whichever is higher."

17. Clause 6 of the tender document cannot be read disjunctively from Clause 5. To put it differently, Clause 6 has to be construed as being in addition to Clause 5 inasmuch as the expression "GMSCL" would also place direct supply order would mean that apart from taking steps as provided under Clause 5, it would operate clause 6 also simultaneously and not in exclusion to Clause 5. It would not be out of context to refer to at this juncture that petitioner has failed to even seek for the purchase orders placed on it commencing from January, 2020 till November, 2020 being quashed and in the absence of such prayer, the prayer for quashing the risk purchase orders, Annexure-A (collectively) cannot be

entertained. Petitioner having acted in breach of the agreement *prima facie*, it cannot be heard to take umbrage under the events which are subsequently unfolded to stave off its contractual obligations. The notice issued on 04.09.2020 issued by petitioner came to be duly replied by the second respondent on 06.12.2021 by traversing the contentions raised by the petitioner and as such, the stand of the petitioner that impugned order has been passed without considering the reply of the petitioner or same being in violation of principles of natural justice does not hold water. In fact, petitioner was not only under contractual obligation but also under obligation to supply the Droxycycline tables during the pandemic period which was very much required to cater to the needs of the Covid patients in the State of Gujarat, which the petitioner had failed to adhere to supply though had agreed. The impugned order passed is in consonance with Clause (5) of the tender document and Condition No.3 of the acceptance letter dated 10.10.2018.

18. For the reasons aforestated, this Court proceeds to pass the following

ORDER

(i) Special Civil Application is dismissed as being devoid of merits. Notice stands discharged. Interim relief, if any, stands vacated.

(ii) Costs made easy.

(ARAVIND KUMAR, CJ)

(ASHUTOSH J. SHASTRI, J)

FURTHER ORDER

After pronouncement of the judgment, learned counsel appearing for the petitioner seeks stay of the operation of this order. We do not find any good ground to grant stay. Hence, said prayer stands rejected.

(ARAVIND KUMAR, CJ)

(ASHUTOSH J. SHASTRI, J)

GAURAV J THAKER