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IN THE HIGH COURT OF DELHI AT NEW DELHI

1.

**W.P.(C) No. 4796 of 2010 & CM Nos. 10628,
10629 & 9494 of 2010**

RANI INFRASTRUCTURE DEVELOPMENT
PRIVATE LTD.

..... Petitioner

Through: Mr. S. Rajan with
Ms. Manisha Narain, Advocate.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. A.K. Bhardwaj with
Ms. Jagrati Singh, Anuj Aggarwal and
Mr. Gaurav Khanna, Advocates for UOI.
Mr. Gourab Banerjee, Additional Solicitor
General of India with
Ms. Padma Priya, Mr. Syeed Abdul Haseeb
and Ms. Meenakshi Sood, Advocates
for NHAI.

CORAM: JUSTICE S. MURALIDHAR

ORDER
14.08.2010

1. The Petitioner, a company having its registered office in Secunderabad, Andhra Pradesh and a regional office in New Delhi seeks a writ of certiorari to quash the decision of the Respondent No.2 National Highways Authority of India ('NHAI') declaring the Petitioner as a non-performing contractor and consequential reliefs of directing NHAI as well as the Union of India ('UOI') through the Ministry of Road Transport and Highways ('MoRTH') (Respondent No.1 herein) to permit the Petitioner to participate in the tendering process for various road projects including the ones relating to NH-202, NH-105 and NH-104.

Signature Not Verified

Digitally Signed By: AMULYA
Certify that the digital file and
physical file have been compared and
the digital data is as per the physical
file and no page is missing.

2. This writ petition was filed on 19th July 2010 and came up for

hearing before this Court first on 20th July 2010 and then again on 23rd July 2010. The Petitioner's case was that its price bid for the tender for the Hyderabad, Bhoopalapatnam Road stretch of NH-202 in Andhra Pradesh were not being opened on account of the NHAI having declared it as a non-performing contractor. Learned counsel for the NHAI informed this Court on 23rd July 2010 that the Petitioner has been declared a non-performing contractor in 2004 itself. This Court did not grant any interim relief on 23rd July 2010 but listed the case for hearing on 30th August 2010 and directed parties to complete the pleadings in the meanwhile.

3. The order dated 23rd July 2010 of this Court was challenged by the Petitioner by filing an appeal LPA No. 551 of 2010. While not interfering with the order of this Court, the Division Bench by its order dated 5th August 2010 disposed of the said appeal and directed the parties to complete the pleadings by 10th August 2010. This Court was requested to dispose of the writ petition itself by 20th August 2010. The Respondents 1 and 2 have since filed their replies on 12th and 13th August 2010 respectively.

4. The Petitioner states that it is a Class-I Contractor carrying on business in the field of construction and in particular road construction for the last 25 years. Para 3 of the writ petition lists out four major works executed by the Petitioner successfully in India and Nepal. The Petitioner entered into a joint venture ('JV') with Lanco Infra Tech Limited ('LITL'). The JV was called Lanco-Rani JV. The JV was

awarded a contract by NHAI for the work of four laning on Km 419 to Km 447 of Purnea-Gayakota Section of NH-31 in Bihar. The contract agreement was signed by the parties on 30th August 2001. The value of the work was approximately Rs. 176.10 crores. The work was to be completed within 36 months i.e. by 18th September 2004.

5. According to the Petitioner the NHAI failed to perform its obligations under the contract which led to the inevitable delay in the completion of the contract. The writ petition lists out the various claims made by the Petitioner arising out of the contract. On 29th May 2008, NHAI issued a letter to the JV in relation to the project concerning the four laning of Km 419 to 447 of Purnea-Gayakota Section of NH-31 stating that in terms of NHAI's criteria the progress achieved was only 75%. The letter stated that the "performance of your firm in respect of the project detailed below is very poor and in accordance with the above criteria and accordingly, it is proposed to declare you as a non-performing contractor and debar you from participation in any future bidding process". The JV was asked to show cause within 21 days. The JV replied to the above show cause notice on 16th June 2008 giving its explanation for the delay in completion of the project, which according to it was either on account of NHAI's omissions or circumstances beyond the JV's control. The JV requested NHAI to review the JV's performance on merits and not to punish the JV "by debarring to participate in your future tenders".

6. The Petitioner states that it did not hear from the NHAI in response

to the above reply dated 16th June 2008. Meanwhile the Petitioner invoked the arbitration clause on 27th December 2008 and the disputes arising out of the performance of the contract were referred to arbitration. The hearing in the arbitration proceedings is stated to have concluded and an Award is awaited. One of the points urged is that the action of the NHAI in declaring the Petitioner a non-performer without awaiting the outcome of the arbitration proceedings is itself unreasonable and arbitrary.

7. The Petitioner states that they could substantially complete the four-laning contract of the Section NH-31 by December 2008. It is stated that the project included construction of two flyovers i.e. the Kishan Ganj Flyover-1 (KGFO-1) and the Kishan Ganj Flyover-2 (KGFO-2). According to the Petitioner the KGFO-2 could not be completed on account of the objection raised by the Railways to the alignment. Reference is made to a letter dated 22nd April 2010 from the Railways in this regard. Although the KGFO-1 was completed, the approach roads to the flyover collapsed on account of unprecedented torrential rains in 2005. Notwithstanding that a certificate was issued by NHAI on 18th April 2009 stating that the "road work of four laning is substantially completed from Km 419 to Km 447", the rebuilding of the approach roads by the Petitioner is stated to be in progress. A final certificate of completion was issued on 7th April 2010 by NHAI's Supervising Contractor for the project i.e. Scott Wilson India Pvt. Ltd.

8. It is stated that sometime in February 2010 there was a tender

notification issued by the Respondent for the work of four laning of the Nagpur-Hyderabad Section of NH-7 in the State of Maharashtra. When the Petitioner requested for the issuance of the bid documents, it received a letter from NHAI on 25th March 2010 that “it has been found that your name has been enlisted as Non-Performing Contractors in NHAI. Hence, issuance of Bid Document cannot be considered at this stage”. The Petitioner wrote a letter of protest on 12th April 2010 stating that “we are shocked to receive your said communication and fail to understand as to why we are not being allowed to participate in the tenders of NHAI”. The Petitioner pointed out that the work in relation to the four-laning of Km 419 to Km 447 of the Pune-Gayakota Section of NH-31 had been completed within the extended time of 31st December 2009 and a completion certificate has been issued on 7th April 2010. “Hence, denying us to participate in the tenders of NHAI is totally unjustified and against the principles of natural justice”. It was pointed out that the action of NHAI “may affect us to participate in the tenders of other departments like MORTH, State PWD’s etc. where though we are not at fault we may become the victims in their hands. Hence we request you to remove our name from the list of Non Performers within 30 days and allow us to participate in the bids by NHAI, failing which we shall take recourse as available to us to readdress our grievance...” It may be pointed out here that it is the Petitioner’s case that it is entitled to be removed from the list of non-performing contractors in terms of the guidelines issued by the NHAI in that regard on 21st July 2008.

9. The petitioner states that when it submitted an application for pre-qualification in relation to the work of widening and strengthening of certain stretches of NH-205, NH-104 and NH-81 under Special Projects in Bihar, it was informed by a letter dated 1st July 2010 from the MORTH that “disqualified/debarred/slow performance/non performer declared by any State/Central Govt. or PSU or Authority would lead to disqualification to your firm”. It was thus plain to the Petitioner that it would be denied the opportunity for tendering in various contracts of the Central and State Governments on account of NHAI declaring it to be a non-performer.

10. The tenders for (R&B) NH Circle, Hyderabad for widening the two lanes and improvements from Km 264 to Km 301 on the Hyderabad Bhoopalapatnam Road of NH-202 in Andhra Pradesh under LWE scheme opened on 14th June 2010. The price bids were scheduled to be opened on 19th July 2010. The Petitioner states that it submitted its bid but was informed by the NHAI that since it had been declared as a non-performing contractor, its bid would not be opened. It is in those circumstances that the present writ petition was filed.

11. In the counter affidavit filed by NHAI, a preliminary objection is taken to the present writ petition being entertained on the ground that the Petitioner has willfully suppressed material facts. It is pointed out that the Petitioner and Lanco Construction, its JV partner, were declared non-performing contractors way back on 9th/10th August 2004.

Annexure R-4 to the counter affidavit of NHAI is a copy of the Circular

dated 9th/10th August 2004 enclosing a list of 17 contractors including the Petitioner and Lanco Construction. It is stated that prior to the above list being published show cause notices were issued and the replies filed thereto considered. The above decision was communicated to the Petitioner but a copy of the said communication was not traceable. However, reference is made to a letter dated 20th August 2004 of the Petitioner addressed to the NHAI requesting for the review of its performance in relation to the project concerning the four laning of Km 419 to Km 447 of the Purnea-Gayakota Section of NH-31 in Bihar. In the said letter the Petitioner has stated "under the facts and circumstances brought out about, we sincerely feel that we do not deserve to be classified as a non-performing party, resulting in denial of opportunity to bid for future works of NHAI". The counter affidavit of the NHAI points out that thereafter the Petitioner wrote to the NHAI on 7th February 2006, 30th April 2006, 16th June 2008 and 6th June 2009 requesting NHAI to remove the Petitioner's name from the list of non-performing contractors. In the circumstances it is denied that the Petitioner was not aware of the order passed by NHAI declaring it to be a non-performing contractor.

12. It is submitted by the NHAI that apart from the suppression of the above material facts, the writ petition is barred by laches inasmuch as for nearly six years after 2004, the Petitioner has not chosen to seek legal redress against it being declared as a non-performer. It is thirdly submitted that the ground that NHAI ought to wait till the arbitral Award is pronounced to declare the Petitioner a non-performer is

untenable since these two were independent proceedings. It is stated that NHAI cannot be compelled to deal with a party which has been declared a non-performer after following the due process.

13. Appearing for the Petitioner, Mr. S. Rajan learned counsel submitted that till today the Petitioner has not been provided with any formal order declaring it to be a non-performer. If, indeed, there was an earlier order of 9th/10th August 2004 declaring it as a non-performer then there was no need for NHAI to have again issued a notice on 29th May 2008 asking the JV to show cause why it should not be declared a non-performer. The inference to be drawn was that the earlier declaration, if any, of the Petitioner as non-performer was given up or condoned by the NHAI. He points out that, admittedly, no order has yet been passed by the NHAI on the plea of the Petitioner in its reply dated 16th June 2008 asking the NHAI to remove it from the list of non-performers. It is submitted that in terms of Para 4 (ii) of the guidelines issued by the NHAI on 21st July 2008 there was no justification for retaining the Petitioner in the list of non-performers when it has successfully completed the four laning project of Purnea-Gayakota Section of NH-31 within the extended time of 31st December 2009 and for which a completion certificate has been issued on 7th April 2010. He reiterated that the circumstances in which the approach roads to the KGFO-1 collapsed were beyond the control of the Petitioner and cannot come in the way of the Petitioner being removed by the NHAI from the list of non-performers. In any event, the Petitioner is reconstructing the approach roads upon a proper assessment made by experts of the causes

behind the collapse of the approach roads earlier constructed.

14. Mr. Rajan pointed out that the decision of NHAI declaring the Petitioner a non-performer was given wide publicity and circulated to all government departments and PSUs. This severely prejudiced the Petitioner and unfairly prevented it from participating in several major tenders valued at over Rs. 8,500 crores. He submitted that the non-mentioning in the petition of the correspondence between the parties in 2004 and 2006 was not deliberate. It should, in any event, not preclude NHAI considering removing the Petitioner from the list of non-performers.

15. Appearing for NHAI, Mr. Gourab Banerjee, learned Additional Solicitor General ('ASG'), submitted that the petition ought to be rejected on the ground of suppression of material facts and laches as already pointed out in the counter affidavit filed by the NHAI. He pointed out that the decision of the NHAI declaring the Petitioner a non-performer was taken way back in August 2004 much before the arbitration proceedings commenced. Therefore, it was legally untenable to contend that till such time the Award was not pronounced in the arbitration proceedings, no decision to declare the Petitioner as a non-performer could have been taken. Mr. Banerjee, nevertheless, stated that the review of the list of non-performers in terms of the NHAI guidelines dated 21st July 2008 was an on-going process and no exception would be made as far as the Petitioner was concerned. In other words, the NHAI would, in accordance with its guidelines, be

willing to review its decision declaring the Petitioner a non-performer.

16. Mr. Bhardwaj, learned counsel appearing for Union of India pointed out that as long as the Petitioner continued in the list of non-performers as declared by NHAI, the MoRTH would not be in a position to accept the bids of the Petitioner as such declaration would be a disqualification.

17. The first point to be considered is whether the Petitioner was aware of the earlier decision dated 9th/10th August 2004 of the NHAI declaring the Petitioner a non-performer? It appears to this Court that the Petitioner was indeed aware of such decision. This is evident from the letter dated 20th August 2004 written by the Petitioner to NHAI asking that it should be removed from the list of non-performers. A copy of the said letter has been enclosed with the counter affidavit of the NHAI and not denied by the Petitioner. The submission that the NHAI impliedly gave up this declaration of the Petitioner to be a non-performer on account of the subsequent show cause notice dated 29th May 2008 is also not correct. The said show cause notice was issued in the context of the review undertaken by NHAI of the list of non-performers. This is evident from the subject matter of the show cause notice dated 29th May 2008 which reads as under:

“Sub: 4-laning of Km 419.00 to 447.00 of Purnea-Gayakota Section of NH-31 in the State of Bihar (Contract Pkg. EW-12/BR).

-Review of performance of contractors on on-going contracts of NHAI reg.” (emphasis supplied)

18. Consequently, the Petitioner despite being aware of being declared as a non-performer since 9th/10th of August 2004 did not choose to challenge such decision for nearly six years. Mr. Rajan, learned counsel appearing for the Petitioner was candid in submitting that the effect of the decision of NHAI began to be felt only in 2010 when the Petitioner on 25th March 2010 was informed by NHAI that it would not be issued the bid documents for the project in Maharashtra and later in June 2010 when the MORTH informed it that the declaration of the Petitioner as a non-performer would disqualify it from being considered for the Special Projects in Bihar. This explains why the Petitioner did not challenge the decision of the NHAI till now.

19. In the considered view of this Court, even though the Petitioner failed to mention the above facts in the writ petition and did not challenge the NHAI's decision till now, that does not and should not preclude the NHAI from reviewing its decision to continue the Petitioner in the list of non-performers since there are guidelines issued by NHAI itself on 21st July 2008 for that purpose. The guidelines insist on "periodic review". Moreover, the learned ASG has fairly submitted that in any event the periodic review of the list of non-performers is anyway undertaken by the NHAI and would also be done in the Petitioner's case. He further added that the decision would be taken keeping in view the law explained by the Supreme Court in *S.N. Mukherjee v. Union of India AIR 1990 SC 1984* and by this Court in *Mekaster Trading Corp. v. Union of India 106 (2003) DLT 573, G.D.*

Tewari & Co. v. DDA 2005 (1) CTLJ 267 (Delhi) and *Prakash Atlanta JV v. National Highways Authority of India 169 (2010) DLT 664*.

20. In view of the above submission, the only relief that can be granted to the Petitioner in the present petition is to direct that if the Petitioner makes a representation requesting NHAI to review the decision dated 9th/10th August 2004, the NHAI should take a fresh decision, in a time-bound manner, in terms of its guidelines dated 21st July 2008, after giving the Petitioner a hearing and considering the materials placed by the Petitioner on record. It is clarified that this Court has not expressed any view on the merits of the Petitioner's claim for its removal from the list of non-performers as declared by the NHAI. Whether in fact the Petitioner satisfies the criteria set out in the said guidelines dated 21st July 2008 for being removed by the NHAI from the list of non-performers is for the NHAI to decide. It is further clarified that any claim that the Petitioner may have on account of the losses, if any, suffered by it on account of the decision of the NHAI will have to be adjudicated in other appropriate proceedings. That right of the Petitioner is not foreclosed by this order.

21. It is accordingly directed that the Petitioner will, within a period of 10 days from today, make a detailed representation to NHAI enclosing with it whatever documents it wishes to rely upon and request the NHAI to review its decision to declare the Petitioner as a non-performer in terms of the guidelines dated 21st July 2008. Within a week of receipt

of such representation, the NHAI will inform the Petitioner of the date on which it proposes to give the Petitioner a personal hearing. A personal hearing should be given to the Petitioner, subject to the above time targets being met, within a period of four weeks from today. The decision on the Petitioner's representation, after giving a hearing to the Petitioner, should be taken by the NHAI by passing a reasoned order within a period of eight weeks from today, consistent with the legal requirements explained in the decisions noted in para 19 of this judgment. The decision will be communicated to the Petitioner within a further period of two weeks thereafter. It will be open to the Petitioner, if aggrieved by such decision, to seek appropriate remedies as may be available to it in accordance with law.

22. With the above directions, the writ petition is disposed of with no order as to costs. The applications are disposed of.

23. A copy of this order be given dasti to learned counsel for parties under signature of the Court Master.



S.MURALIDHAR, J

AUGUST 14, 2010
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