

Judgment Reserved on 02.11.2023
Judgment delivered on 20.11.2023

Chief Justice's Court

Case :- WRIT - C No. - 66679 of 2012

Petitioner :- Shri Neeraj Upadhyay

Respondent :- The National Highways Authority Of India And Others

Counsel for Petitioner :- Shishir Prakash,C.P. Upadhyay,Kartikeya Saran,Shad Khan

Counsel for Respondent :- R.K. Singh,Devendra Kumar,Mohd.Ali,S.C.,Sunil Kumar Yadav

Hon'ble Pritinker Diwaker,Chief Justice

Hon'ble Ashutosh Srivastava,J.

Order on the Application seeking condonation of Delay

This is an application seeking the condonation of delay in filing the Review Application seeking the review of the judgment and order dated 18.01.2019 passed by this Court in Writ C-No. 66679 of 2012. The Review is reported beyond time by 27 days. The application for condonation of delay is not opposed and as such the same is allowed. Delay in filing the Review Application is condoned. The Review Application shall now be treated to have been filed within time.

Order on the Civil Misc. Review Application No. 12 of 2019

This is a Review Application seeking the Review of the final judgment and order dated 18.01.2019 passed by Hon'ble Govind Mathur, Chief Justice and Hon'ble Chandra Dhari Singh, J in Writ Petition C No. 66679 of 2012 (Shri Neeraj Upadhyay vs. The National Highway Authority of India and others). The relief claimed by the Review Applicant is that the Review Application be allowed, the order dated 18.01.2019 passed in the writ petition be set aside and the same be allowed with costs.

From the perusal of the order dated 18.01.2019 deciding the writ petition it is borne out that the writ petition was dismissed being bereft of merit observing as under:

"From perusal of the facts stated above, it is not in dispute that in pursuance

to the notice inviting tender dated 28th February, 2012, the petitioner was the only bidder. The Executive Committee of the National Highway Authority of India met on 9th May, 2012 and while considering Agenda Item No.14 resolved as under:-

"The Committee deliberated the issue and to save loss of revenue, approved to award the work of collection of user fee at Allahabad Bypass to the single bidder Shri Neeraj Upadhyay initially for a period of 6 months during which period bids should have invited again as assessment of traffic on the stretch would have taken place."

The decision aforesaid was taken prior to acceptance of the bid submitted by the petitioner. The agreement was also executed between the parties in accordance with the resolution undertaken by the Executive Committee of the National Highway Authority of India. The facts stated above, in quite unambiguous terms indicate that the National Highway Authority of India though invited bids for a period of one years but subsequent thereto was not intending to award the contract for a period of more than six months. This decision was taken in interest of National Highway Authority of India. In light of this decision taken, the contract was executed and that was accepted by the petitioner also.

In view of whatever stated above, the allegations of the petitioner are absolutely ill founded and the petition for writ is bereft of merit. The same hence, is dismissed."

Learned counsel for the Review Applicant vehemently submits that this Court while finally deciding the writ petition by the order dated 18.01.2019 has proceeded on the erroneous assumption that the Executive Committee of the respondent National Highway Authority of India (NHAI) met on 09.05.2012 and under the Agenda Item No. 14 resolved to award the work of collection of user fee at Allahabad Bypass to the Review Applicant being single Bidder for a period of 6 months in as much as the Letter of Acceptance was issued by the NHAI on 23.05.2012 (Annexure 6 to the writ petition) whereas the Minutes of the Meeting of the Executive Committee held on 09.05.2012 was issued on 25.05.2012 (Annexure-CA-3 of the short counter affidavit) subsequent to the issue of the LOA. In substance it is submitted that the conditions of the contract were unilaterally altered subsequent to the issue of LOA which cannot be permitted in law and as the judgment and order dated 18.01.2019 is liable to be reviewed.

Learned counsel for the Review Applicant further contends that the judgment and order under review ignores the dictates of Hon'ble Supreme Court as also of this Court with regard to identical controversy decided relating to rights of tender awarding authority to curtail the contract period, coupled with the arbitrary and

unilateral alteration of the Tender conditions, reliance upon incorrect factual aspects with regard to minutes of meeting and government order dated 14.07.2000, interpretation of the word 'Initially' and its use in fixing the period of the contract, acceptance of all formalities and requirement of all obligations as per one year period, manipulation of the due process and abuse of dominant position has rendered the judgment and order dated 18.01.2019 liable to review.

The Review Petition has been opposed by Shri Diwakar Rai Sharma, learned counsel representing the contesting respondent NHAI, who submits that there is no error on the face of the record warranting the review of the judgment and order rendered. All grounds taken in the memo of the revision were argued and considered by the Court in its order dated 18.1.2019. A repetition of old and overruled arguments cannot be permitted and concluded adjudications cannot be reopened. A review petition cannot be an appeal in disguise.

We have heard learned counsel for respective parties and have perused the record.

From the perusal of the order dated 18.1.2019, which has been sought to be reviewed, we find that the order proceeds on the premise that the Executive Committee of the National Highways Authority of India had met on 9.5.2012 and had awarded the tender to the review applicant on the decision taken while considering Agenda Item No. 14 initially for a period of six months. It was observed in the order that the decision aforesaid was taken prior to acceptance of the bid submitted by the petitioner. However, we find that though the Executive Committee had met on 9.5.2012, the minutes of the meeting were issued on 25.5.2012, which is subsequent to the issuance of the LOA in favour of the review applicant.

It is settled law that tender conditions could not have been altered or reduced unilaterally after the grant of the tender. Reference in this regard may be had to the decision rendered by co-ordinate Bench of this Court in ***Civil Misc. Writ Petition No. 41026 of 1992 (Suresh Chandra versus State of U.P. and others)*** decided on 14.7.1993; ***Civil Misc. Writ Petition No. 7423 of 1989 (Mohd. Kaiser versus State of U.P.)*** decided on 31.5.1991; ***Civil Misc. Writ Petition No. 9562 of 1992 (Pt. Gorakh Nath Upadhyay versus State of U.P. and others)*** decided on 7.4.1992 as well as decisions rendered in cases ***Ssangyong Engg. & Constructions Co. Ltd. versus National Highways Authority of India, (2019) 15***

SCC 131; Beg Raj Singh versus State of U. P. and others, AIR 2003 SC 833; Ajay Kumar Singh versus State of U.P., 2010 (2) ADJ 399 (DB); Mahesh Chand versus State of U.P., 1987 UPLBEC 601. Since, the order dated 18.1.2019 proceeds on an erroneous assumptions, we are left with no option but to review the same. Accordingly, the order dated 18.1.2019 passed by this Court is hereby recalled. The Review Application stands **allowed**. The writ petition is restored to its original number.

From the records, it is also evident that this Court under interim order dated 8.2.2013 while recording the submissions of the Review Applicant and noting the fact that six months' period of settlement in favour of the petitioner was to end on 13.2.2013 had extended an offer to the petitioner to match the new bid pursuant to the tender notice dated 5.12.2012 permitted the petitioner to carry out the aforesaid offer and deposit the differential amount for the remaining six months period on due dates as per the terms and conditions of the tender notice. The higher amount or the differential amount deposited by the petitioner was directed to be kept under a different head and would abide by the final judgment of this Court in the present writ petition.

It was further made clear by the Court under the interim order dated 8.2.2013 that the benefit of depositing higher amount by the petitioner would entitle him to a further settlement only till 13.8.2013 and the respondent authority would be free during the pendency of this writ petition to take steps for settlement of right to collect the toll after 31.8.2013, in accordance with law.

In pith and substance, we find that the petitioner has carried out his entire term of one year, which ended on 13.8.2013 and in such circumstances, petitioner cannot raise any grievance regarding the period of the contract. The question before this Court is "as to what relief, the petitioner is entitled to?"

From the records, it is further revealed that for the additional six months period from 13.2.2013 to 13.8.2013, a FD amounting to Rs.14,98,04,350.35/- (FD No. 202388 dated 28.11.2013) was kept and renewed by NHAI from time to time. The performance bank guarantee was released on 1.11.2013, which was duly received by the petitioner. Cash security amounting to Rs.3,56,37,253/- through RTGS on 29.10.2013 was released in favour of the petitioner after adjustment of toll fee dues.

From the records, we also find that the respondent NHAI under letter dated 19.2.2013 directed the petitioner to deposit a sum of

Rs.50,84,833/- every week, in addition to the original amount required to be deposited by the petitioner i.e. Rs.1,26,96,702/- per week. The aforesaid letter has been brought on record by way of a supplementary affidavit dated 3.11.2023. It is contended that the review applicant had been complying with the conditions as laid down by the respondent NHAI issued from time to time. Further, we find that the review applicant/petitioner in terms of the directions of this Court contained in the interim order dated 8.2.2013 as also the letter dated 19.2.2013 issued by the NHAI has deposited total differential amount to the tune of Rs.13,78,53,459/- which amount is exclusive of any interest thereon. The details of depositing the aforesaid amount has been annexed as Annexure-SA2 to the supplementary affidavit dated 3.11.2023. Thus, we find that the petitioner has duly worked for the entire tender period of one year and paid all dues to the NHAI as required under the contract. Since, we have held that the NHAI could not alter the terms of the original contract unilaterally and limiting the same for a period of six months, we hold that the subsequent tender floated by the NHAI dated 5.12.2012 was totally unwarranted. The amount deposited by the petitioner over and above, the original contract amounting to Rs.13,78,53,459/- excluding the interest thereon deposited under orders of this Court, which was directed to be deposited in a separate head/account with the NHAI, is liable to be refunded to the petitioner.

Accordingly, the writ petition stands ***allowed***. The respondents are directed to refund the excess amount (differential amount) deposited by the petitioner and kept in a separate head/account under the interim orders of this Court dated 8.2.2013 amounting to Rs.13,78,53,459/- be refunded to the petitioner along with the interest accrued thereon within a period of one month from the date of service of certified copy of the order of this Court.

Order Date :- 20.11.2023

Deepak/

(Ashutosh Srivastava,J.) (Pritinker Diwaker,CJ.)