IN THE HIGH COURT OF JUDICATURE OF BOMBAY BENCH AT AURANGABAD

PUBLIC INTEREST LITIGATION NO.104 OF 2012
WITH
CA NO. 10394 OF 2013.

Shashikant s/o Pemraj Changede - PETITIONER

VERSUS

The State of Maharashtra & Ors. - RESPONDENTS

*****

Mr.Nitin V.Gavare, Advocate for Petitioner/s

Mr.Vinod Joshi, Adv. For Applicant (in CA 10394/13)

Mr.SG Karlekar, AGP for State.

Mr.SR Vakil, Adv. For Respondent No.6.

Mr.PM Shah, Sr. Counsel, h/for Mr. MV Bhamre, Adv.for Respondent No.7;

CORAM : R.M.BORDE & P.R.BORA,JJ.

DATE OF RESERVING ORDER : 19.10.2015
DATE OF PRONOUNCING ORDER:30.10.2015

PER COURT :

1) Heard the learned Counsel appearing for the parties. The present Public Interest Litigation pertains to the construction work of four-laning of Kopargaon – Ahmednagar road (State Highway No.10) from 120.00 kms to 175/530 kms on Build, Operate and Transfer (BOT) basis. The following objections are

raised by the petitioner in respect of the aforesaid work, which according to him require to be probed into and action needs to be taken against the contractors as well as officers responsible for occurrence and commission of such illegalities, -

<u>OBJECTIONS</u> :

i) The allotment of the subject work to Respondent No.5 – M/s Ram Infrastructure Ltd. and the subsequent handing over of the said work to Respondent No.7 – M/s Supreme Ahmednagar – Kopargaon Tollways Pvt. Ltd., is illegal;

ii) That the Provisional Completion Certificate issued in favour of Respondent No.7 is incorrect since 98% of the total work was not completed on the date, as mentioned in the said Certificate;

iii) The permission accorded to Respondent No.7 for collection of toll on the basis of the aforesaid Certificate dated 14.9.2011, is illegal and no such permission was liable to be granted, since the work was not completed in all respects;

iv) That the permission accorded in favour of

Respondent No.7 for collection of toll ought to have been suspended in view of proposal dated 24.1.2014 moved by the Chief Engineer to the Secretary of the Public Works Department, State of Maharashtra;

v) That the act of the respondents, in extending the period of concession up to 31st January, 2017, is illegal, arbitrary and violative of Articles 14 and 21 of the Constitution of India and hence the extension of period needs to be cancelled;

vi) That the contractors need to be saddled with adequate penalty/damages for not completing the subject work within the stipulated period and also not in accordance with the terms and conditions of the tender.

Vii) Though, in the initial contract agreement, the contractor was supposed to construct a rest house and recreation center (community hall), during the project implementation, the scope of the aforesaid work was changed without Government approval and the said change has been made only with a view to unduly favour the contractor at the cost of general public.

viii) That, the quality of the road is inferior and does not satisfy the norms laid down in the Maintenance Manual and that the roughness index is not maintained.

2) Shri Sanjeev Sambhaji Ghodke, Sub-Divisional Engineer, World Bank Project, Sub-Division No.1, Ahmednagar, has filed an affidavit in reply on behalf of Respondent Nos.4 and 5, denying the allegations raised in the petition. Shri Nityanand Shankarrao Deshpande has filed an affidavit in reply for and on behalf of Respondent No.7. The petitioner has filed affidavit in rejoinder to the affidavit in reply filed by Respondent Nos. 4 and 5. Respondent Nos. 4 and 5 have thereafter filed additional affidavit in reply to the rejoinder affidavit filed by the petitioner. On 12th June, 2015, Sanjeev Ghodke has filed another affidavit in reply on behalf of Respondent Nos.1 to 5. Shri Chandrakant Namdeo Jagtap, Sub-Divisional Engineer, World Bank Project, Sub-Division No.1, Ahmednagar has lastly filed an additional affidavit in reply on behalf of Respondent Nos.1 to 5 on 4th August, 2015.

3) The petitioner has filed on record several documents in support of the contentions raised in the petition. Respondents have also along with their affidavits and additional affidavits in reply have placed on record various documents in support of the contentions raised by them in their respective affidavits in reply.

4) Shri Nitin Gavare, learned Counsel appearing for the petitioner, made elaborate submissions and referred to the documents filed on record by the petitioner. Shri Karlekar, learned AGP argued on behalf of Respondent Nos. 1 to 5; whereas Shri P.M.Shah, learned Senior Counsel, argued on behalf of Respondent No.7.

5) In so far as allotment of the work to Respondent No.6 – M/s Ram Infrastructure Ltd. is concerned, we do not find any illegality in allotment of the subject work in favour of the said respondent. The documents on record show that a tender was floated inviting offers from the prospective bidders and in open and transparent manner the offer of respondent No.6 was accepted by the respondents.

Merely because Respondent No.6 could not complete the said work within the stipulated period and, therefore, the said work was required to be handed over to Respondent No.7, the initial tender process cannot be held to be illegal. No such material has been pointed out by the petitioner so as to draw any such conclusion, showing any illegality in award of the initial contract in favour of Respondent No.6. As is revealing from the affidavit in reply filed by Shri Sanjeev Ghodke on 12th April, 2013, 15 contractors have applied for pre-qualification. The affidavit in reply further reveals that in the pre-bid meeting of the prospective enterprenuers, which was held on 11.7.2005 in the office of Chief Engineer, Public Works Region, Nasik, some of the prospective enterprenuers requested for clarification regarding the work and tender conditions, as a result of which, an addendum-cum-Common Set of Deviation (CSD) was issued. As further stated in the affidavit in reply, the said CSD forms the part of the tender document. The reply further reveals that since the offer of Respondent No.6 was most competitive and since he was the lowest bidder, his offer was accepted. The affidavit in reply further reveals that in the negotiations, Respondent No.6 agreed to complete the subject work for the value of Rs.99.81 crores with the concession period as 10 years, 4 months and 3 days. Nothing has been pointed out by the petitioner that a more competitive offer was made by some other contractor, but the same was discarded and the offer made by Respondent No.6 was accepted, in absence of which, the objections raised by the petitioner has to be rejected that the contract was illegally allotted in favour of Respondent No.6.

6) The further objection raised by the petitioner is in respect of handing over of the subject work to Respondent No.7. The documents on record transpire that there was tripartite agreement between the Public Works Department, Contractor and State Bank of India and the State Bank of India was well within its right to handover the subject work to Respondent No.7 after realizing that it was not possible for Respondent No.6 to complete the said work. We do not find anything wrong in the decision taken by the State Bank of India to handover the rest of the work to Respondent No.7 in terms of the tripartite agreement. As per the terms of the

tripartite SPV agreement, the lender bank was empowered to withdraw the work from one enterprenuer and allot it to another. The objection is, therefore, liable to be rejected.

7) The next objection raised by the petitioner and which has been much pressed by the petitioner, pertains to grant of permission to Respondent No.7 to start the toll collection on the basis of Certificate issued in his favour on 14th September, 2011, certifying that the cost of the work done on BOT project is more than 98% of the revised project costs and that all parts of the project can be legally, safely and reliably open for commercial operation. The aforesaid certificate was issued as per clause No.3.7.9 of the contract agreement and accordingly the permission to levy the toll was granted w.e.f. 20th September, 2011. It is the contention of the petitioner that the aforesaid Provisional Completion Certificate was falsely issued in favour of Respondent No.7 and, in fact, the work completed till that date was less than 98% of the total work. It is the further grievance of the petitioner that only with an intention to facilitate the toll-

Collection by Respondent No.7 that the cost of subject project was illegally reduced and based on the same, the Provisional Completion Certificate was issued in favour of Respondent No.7. It is also the contention of the petitioner that, in fact, there is no such provision of issuance of Provisional Completion Certificate. According to the petitioner, until and unless 100% work is completed, the levy and collection of the toll cannot be permitted.

8) The petitioner has further objected to Certificate dated 4.4.2013 issued in favour of Respondent No.7, whereby the Executive Engineer, Road Project Division, Ahmednagar, has issued the completion certificate. It is the submission of the petitioner that the alleged Completion Certificate dated 4.4.2013 was issued for financial purposes, certifying that the contractor has carried out the work up to 100% value of the subject work. However, on site, the work was not completed 100% and some work was still incomplete. Our attention was invited to letter dated 4.4.2013 issued by Executive Engineer, Road Project Division, Ahmednagar to Respondent No.7, clarifying the aforesaid position,

which is at page No.180-B of the paper book and marked at Exhibit-V.

9) The learned Counsel for the petitioner thereafter brought to our notice letter dated 13.1.2014 issued by the Superintending Engineer, PWD Circle, Ahmednagar, wherein, it has been clarified that the subject work was not physically completed. The Superintending Engineer in his aforesaid letter has stated that, the earlier letter dated 04.04.2013 shall be deemed to have been cancelled.

10) Clause 4.4 of the tender agreement provides that, the entrepreneur shall be permitted to collect the toll after completion of all works of project in all respect and after issue of completion certificate by Engineer In-charge, as specified by the Government. According to the Petitioner, in view of Clause 4.4, Respondent No.7 should have been permitted to collect the toll only after 100% completion of the work. The Respondents have denied the objection of the Petitioner. As contended in the affidavit in reply, filed on behalf of Respondent Nos.1 to 5 as well as by Respondent No.7, as per

Clause 3.7.9 of the contract agreement, the entrepreneur was entitled to collect and retain the toll amount as per the Bombay Motor Vehicle Tax Act, 1958, and as per the rates specified in the Scheduled in Section 8 from the date of issue of provisional completion certificate. The Government Circular dated 03.10.2002, provides for issuance of the provisional completion certificate on completion of 98% of the total work. In view of the aforesaid Circular, the objection raised by the Petitioner that, there was no provision for issuance of provisional completion certificate is liable to be rejected. Similarly, in view of Clause 3.7.9 of the tender agreement since the entrepreneur was entitled to collect and retain the toll amount from the date of issuance of provisional completion certificate, the further objection raised by the Petitioner that, no permission should have been granted to Respondent No.7 for collection of toll on the basis of the provisional completion certificate will also have to be rejected.

11) The petitioner has also alleged that the project cost was purposely reduced by deleting

certain works, so that the Provisional Completion Certificate can be issued to Respondent No.7 and he can be permitted to start the collection of the toll. However, after having gone through the documents placed on record, this allegation is found to be unsustainable. The total project cost was Rs. 99.81 crores and the concession period envisaged was 10 years, 4 months and 3 days. Admittedly, the work worth Rs. 17.09 crores was deleted and the additional work has been done of Rs. 9.45 crores. After the aforesaid deletion and addition, the final project cost was Rs. 92.18 crores. It is also revealed that the concession period has been proportionately reduced and is finally set to 9 years 9 months and 23 days. The Respondent Nos. 4 and 5 in their affidavit in reply filed on 12.4.2013 have provided particulars in respect of deletion of work to the tune of Rs. 1708.74 lakhs and justification therefor. Para 19 of the said affidavit is relevant in this regard, which reads thus :

> "19. The respondent says and submits hat there was deletion of work to the tune of Rs. 1708.74 lacks and item wise reasons for deletion is given below, -

1. There was provision of widening of 71 pipe drains out of 51 pipe drains has widened. 20 pipe drains were deleted due to following reasons, -

a. At the location of 3 pipe drains one box culvert was constructed.

b. Due to ghat improvement there was no need of 2 pipe drains.

c. At 15 locations due to alignment and there was no need of pipe drains.

2. There was provision of reconstruction of 10 H.P. Drains. Out of 5 were completed. At 5 locations due to profile improvement there was no need of reconstruction of 5 H.P. Drains.

3. a. One minor bridge @ 152/203 was reconstructed by increasing height. Hence considered in variation. So deleted from original scope.

b. A minor bridge @ 165/107 found of existing of sufficient width hence deleted from original scope.

c. A minor bridge @ 168/952 cannot be widened due to pipe lines on both side. Hence deleted.

4. One bus bay @ Vilad Pumping station cannot be constructed due to pipe lines on both sides, hence proposed for deletion.

5. Shifting of pipe lines as per the inspection note of Chief Engineer. It

was suggested to shift pipe lines by concerned department i.e. by MIDC and Municipal Corporation. Hence this amount was proposed for deletion.

6. There was provision of 13100 mtr. Of concrete built up gutter. Out of 4400 concrete gutter length is proposed of deletion of costing about Rs. 66.00 lacks. Because at the time of execution it was found not necessary due to profile improvement.

7. At the time of execution @ 9400 mtr. Of length where there was no need to construct pitched gutter due to profile improvement the time of execution.

8. For beautification of roads additional land was required. Due to unavailability of land this beautification of junction was not possible in city portion length. Hence proposed for deletion.

9. The transplantation item was initially deleted in CSD but enterprenuer has considered this cost in form-6. Hence this amount proposed for deletion.

10. The respondent says and submits that in respect of Rahuri under pass villagers and the people wanted fly over bridge at this location and, therefore, they gathered and stopped

the work of under pass. As per the demand of the public six lane road has been constructed from the traffic point of view instead of fly over bridge. Hence the cost of Rs.200 lacks was proposed for deletion.

While preparing the project proposal there was a good view of keeping all above provisions. But due to field difficulties, it was necessary to delete above provisions.

The deletion items has been deleted from project cost and considered in cash flow and concession period is reduced for this item. Government has done notification by considering this deletion cost of work"

. In para 20 of the Affidavit in reply, Respondent Nos.4 and 5 have provided the information as regards the additional work done of worth Rs. 945.29 lakhs. We reproduce herein below the said para 20.

"20. The respondent says and submits that additional work costing Rs.945.29 lacks was as under :

Sr.No.	Particulars of work	Cost of work
1)	Dehere under pass	Rs.260.90 lacks
2)	Rahuri six lane	Rs.108.00 lacks
3)	Pipe line encasing	Rs.23.00 lacks
4)	Box Cell construction @ 120/461	Rs.173.90 lacks

5)	Canal bridge reconstruction at 125.200	Rs.34.30 lacks
6)	Minor project @ 152/230	Rs.50.23 lacks
7)	Vilad ghat development Km. 163/800 to 164/200	Rs.294.96 lacs
	TOTAL:-	**Rs.945.29 lacks**

12) As has been submitted by Respondent Nos. 4 and 5, on the date of issuance of the Provisional Completion Certificate, Respondent No.7 had completed the work worth Rs. 90.35 crores, which according to the respondents, was more than 98% of the total cost. In premise of the facts, as aforesaid, the allegation made by the petitioner does not deserve consideration.

13) The another issue raised by the petitioner is about non-consideration of the recommendations made by the Chief Engineer, vide letter dated 24.1.2014 to the Secretary of the Public Works Department for suspension of the toll collection by Respondent No.7.

14) We have perused the contents of the letter dated 24.1.2014. It appears that the Chief Engineer has forwarded such proposal on the basis of the letters from the Superintending Engineer, Public

Works Region, Ahmednagar dated 16.11.2013 and 23rd January, 2014. We have perused the said letters also, which reveal that the Superintending Engineer has informed to the Chief Engineer that the contractor had not taken the appropriate measures for the maintenance of the subject road and according to him, the roughness index was not maintained. It is the contention of the petitioner that in spite of recommendation from the Chief Engineer, which was based on the report received to him from the Superintending Engineer, no appropriate action was initiated against Respondent No.7 and collection of toll by him was not suspended. In so far as the aforesaid allegation is concerned, the learned Senior Counsel appearing for Respondent No.7, brought to our notice the actions taken pursuant to the letter dated 24.1.2014 written by the Chief Engineer. Respondent No.7 has placed on record the Minutes of the meeting held on 7.2.2014, in which the issues of incomplete work as well as the maintenance of the subject road, were elaborately discussed. The learned Sr. Counsel also brought to our notice the action taken report. On perusal of the said report, it is revealed that all the concerned officers have reported the compliance of the decisions taken in the meeting held on 7.2.2014. The learned Senior Counsel also brought to our notice the report received from Maharashtra Engineering Research Institute (MERI) pertaining to the roughness index test, wherein it has been reported that the roughness index was well within the given parameters. In view of the above, the objection raised by the petitioner needs no consideration.

15) The petitioner has further alleged that the concession period has been illegally and unauthorizedly extended up to 31.1.2017. There is no dispute that the work order dated 10th May, 2007 issued to Respondent No.6 prescribes the period of concession as 10 years, 4 months and 3 days. It is further not in dispute that the accepted tender cost of the project at that time was Rs.99.81 crores. As provided under clause 3.1.3 of the tender document, the "commencement date" shall mean the date on which the work order is issued to the enterprenue. As provided under Clause 3.1.4, the concession period shall mean the period which starts from the commencement date of works to the prescribed date of

taking over the project by the Government. In the instant matter, the date of commencement has to be held as 10.5.2007, i.e. the date on which the work order was issued to Respondent No.6. The concession period was, therefore, to expire on 10th September, 2017 as per the initial contract. It has come on record that the work worth Rs.17.09 crores was deleted whereas the additional work worth Rs.9.45 crores was included and after deletion and addition, as above, the project cost was settled to Rs.92.18 crores. The documents on record show that since the project cost was decreased the period of concession was proportionately reduced and it was prescribed as 9 years, 9 months and 23 days. Though it is the contention of the petitioner that the period of concession was illegally enhanced, from the material on record, it is difficult to accept the contention of the petitioner. The Notification dated 31st March, 2015 on the basis of which probably the petitioner has raised the objection that the period of concession has been extended, was not in fact issued for the purpose of extension of the period, but seems to have been issued for prescription of the rate of toll for the period from 1.4.2015 to 31.3.2016 and thereafter from 1.4.2016 to 31.1.2017. We have carefully perused the said notification, which also notes that the initial concession period was prescribed as 10 years, 4 months and 3 days, and subsequently it was reduced to 9 years, 9 months and 23 days. The said period expires on 31.1.2017. It therefore cannot be inferred that vide notification dated 31.3.2015 the period has been extended.

16) After having considered the entire material on record, it does not appear to us that any case is made out for directing any enquiry in respect of the subject work, as prayed for by the petitioner. On the basis of material brought on record by the petitioner, it is difficult to draw any such irresistible conclusion that gross illegalities have occurred in executing the subject work, more so when the respondents have denied all such allegations and have also placed on record the documents rebutting the said allegations. As such, the petition deserves to be rejected and is accordingly rejected. Pending Civil Application stands disposed of.

sd	**sd**
(P.R.BORA)	**(R.M.BORDE)**
JUDGE	**JUDGE**

bdv/
fldr 21.10.15