IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.21975 of 2012

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M/s U Toll Corporation Ltd., F- 281, Ground Floor, Near Janta Garden, Pandav Nagar, Mayur Vihar Ph-1, New Delhi 110 091 through its Director, namely, Prem Shankar Pandey

.... Petitioner

Versus

1. The National Highways Authority of India (Ministry of Road Transport and Highways), G-5 & 6, Sector 10, Dwarka, New Delhi-110 075 through its Chief General Manager (CO)
2. Chief General Manager (CO), National Highways Authority of India (Ministry of Road Transport and Highways), NHAI G-5 & 6, Sector 10, Dwarka, New Delhi- 110 075
3. General Manager (CO), National Highways Authority of India (Ministry of Road Transport and Highways), G-5 & 6, Sector 10, Dwarka, New Delhi- 110 075

.... Respondents

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Appearance :

For the Petitioner : Mr. Abhay Kumar Singh, Sr. Advocate
Mr. Naresh Dikshit, Advocate

For the Respondent-NHAI : Mr. S.D. Sanjay, Addl. S.G.,
Mr. Anshay Bahadur Mathur, CGC

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CORAM: HONOURABLE JUSTICE SMT. ANJANA MISHRA

CAV JUDGMENT

Date: 11-12-2017

The instant writ application seeks to assail a show cause notice No.NHAI/13013/547/CO/10-11/Competitive Bidding dated 18.10.2012, as contained in Annexure 8 to the writ application, whereby and whereunder the N.H.A.I. has proposed to terminate the contract agreement on the ground that the petitioner has submitted a false certificate of Net Worth, which tantamounts to violation of Clause 2(d) of Section II of Request for Proposal (RFP). A further direction has been sought for setting aside the fresh Tender Notification No.NHAI/13013/547/CO/11-12/Competitive Bidding dated 23.10.2012, as contained in Annexure 9 to the writ application, whereby and whereunder the respondents have invited fresh bids for the sites over which the petitioner is operating and has a valid and existing contract.

By way of I.A. No.3089 of 2013, the petitioner has also sought for setting aside the order dated 04.12.2012, bearing No.NHAI/13013/547/CO/11-12/Competitive Bidding, as contained in Annexure 11 to the interlocutory application, by which the NHAI has withdrawn the Letter of Award without prejudice to any other right available to NHAI.

2. The aforementioned challenge has been placed to the impugned action of the respondents stating that it has no legal sanction or authority and the respondents are not entitled to terminate the contract by invoking Clause 2 (d) of Section II of the RFP as the interpretation accorded to the said clause is wholly erroneous and unsustainable.

3. The petitioner's further issue is that the certificate of Chartered Accountant produced by them along with the bid was not a false certificate as the `Net Worth' and `Financial Capacity' of the petitioner has been truly depicted in the certificate and

there is no falsity or misrepresentation, so as to attract the provision of Clause 2(d) of Section II of the RFP.

4. Learned counsel for the petitioner submitted that the term “Net Worth” depicts the creditworthiness of an individual or the Company. In simplistic terms, according to the learned counsel, “Net Worth” is equal to Assets minus Liabilities. Therefore, to determine the “Net Worth”, the respondents are required to consider the value of the assets of the Company. The certificate produced by the petitioner takes into account the value of the lands as per the present circle rates. It is not the same as Revalued Reserve. The definition of “Net Worth” mentioned in the RFP does not permit the ascertainment of the correct and present creditworthiness of the bidders. Therefore, the calculation adopted by the respondents to hold that the “Net Worth” of the petitioner is only Rs.4.93 crores is incorrect. It has been submitted that there was no revaluation of reserves done by the Company. Its Reserve did not include any revaluation reserves. It is common knowledge that revaluation of reserves is done by Companies generally to claim depreciation thereupon. In the case of the petitioner, the main asset is land. No depreciation is claimed on land. Hence, there was no need to revalue the assets. The Chartered Accountant has only taken the prevailing circle rates

while calculating the Net Worth, which is the standard practice. Merely because the National Highways Authority of India (NHAI) adopts a different method of calculation, the Certificate issued, according to normal practice, will not become false or misleading.

5. Before delving deep into the issue raised by the petitioner in the present writ application, the respondents have raised a preliminary objection that the matter may proceed further only after this Court decides on the point of jurisdiction of maintainability of the Writ before this Court. It was contended by the respondents that the writ petition is not maintainable before this Hon'ble Court at Patna for following two reasons :

i) Clause 25 of the RFP has clearly provided that the bidding process shall be governed by, and construed in accordance with law of India, and the courts of New Delhi shall have exclusive jurisdiction over all disputes arising under with the bidding process; and

ii) No part of cause of action arose within the territorial jurisdiction of this Hon'ble Court for invoking the Writ jurisdiction of this Hon'ble Court by the petitioner.

6. Learned counsel for the NHAI submitted that at the very outset, at the time the counter affidavit had been filed in the year 2012, the respondents had objected in paragraphs 4 and 5 of their counter affidavit about the maintainability of the writ petition regarding the jurisdiction of this Court with reference to Clause 25(i) of R.F.P, by which it was specifically agreed that the Courts in New Delhi shall have exclusive jurisdiction. It had been contended therein that the Pre-Bid Meeting of the potential tenderers which had been invited, through the Notice Inviting Tender (NIT), for procurement of fee collection at Toll Plaza was to be situated in different parts of the country i.e., Assam, Andhra Pradesh, Bihar and West Bengal and were issued from Delhi and the tender was to be submitted in Bombay with office address for communication being Delhi. It was further contended that the bid was to be evaluated in Delhi and the selection thereof was to be finalized in Delhi. The Letter of Award (LOA) was to be issued in Delhi and the Agreement thereof in favour of successful bidders was to be entered into between them and the respondents in Delhi. The Bid Security, as well as the Performance Security was also to be furnished in Delhi. Over and above, as per Clause 25, it was accepted by the parties to approach only the Court in Delhi for any or all the disputes with respect to the bidding process. The

Office of the petitioner from which the entire communication has to be made between himself and the respondents is also situated in Delhi.

7. In the present case, the argument further advanced by the respondents is that the communication letter dated 27.02.2012 (Annexure 4) with regard to selection of the writ petitioner on the basis of competitive bidding was issued by the respondents from its Head Office in Delhi and was served in the Office of the petitioner in Delhi. The letter of the respondent-NHAI dated 23.05.2012 (Annexure 5) was also issued and served on the petitioner in Delhi. The letter dated 30.07.2012 of the respondent-NHAI (Annexure 6) seeking certain clarifications from the petitioner with regard to "Net Worth" of the Company as on 31.03.2011 was also issued and served in Delhi. The letter dated 16.08.2012 of the Respondent-NHAI (Annexure 7) seeking further clarification from the petitioner was also issued and served in Delhi. The show cause notice dated 18.10.2012 issued by the respondent-NHAI (Annexure 8) was also issued and served at Delhi. The letters dated 28.01.2012 (Annexure 14 of the reply to the counter affidavit), dated 29.05.2012 (Annexure 15 of the reply to the counter affidavit), dated 07.06.2013 (Annexure 16 of the reply to the counter affidavit) have been issued and served on the

petitioner in Delhi. In the present case, even before the contract contained in Section 4 of RFP could be entered into, the Letter of Award was withdrawn/revoked in Delhi, which was also communicated to the petitioner in Delhi. Thus, the bidding process could not be completed by signing of contract in terms of Clause 23 of the RFP. Hence, Clause 25 became applicable and to resolve any dispute arising out of this bidding process and if at all the petitioner felt aggrieved, he could have approached to the Courts in Delhi.

8. Learned Senior Counsel further contended that the language of Section 25 is very clear. It is in two parts. Firstly, it says that the courts of New Delhi shall have exclusive jurisdiction and secondly, it says that over all disputes arising under, pursuant to or in connection with the bidding process would be decided at Delhi. In the present case, the Letter of Award, which was issued in connection with this bidding process, has been withdrawn. Therefore, this Clause comes into play. Even if the Agreement could have been executed, this Clause could have been invoked. However, in the facts of the present case, the Agreement has not been entered into. Thus, there is no scope of any intendment and Clause 25 becomes fully applicable.

9. It was thus submitted that the petitioner in the writ

petition in paragraph 3 has not set out the foundational fact as to how he has invoked the writ jurisdiction of this Hon'ble Court, save and except, by stating that the situs of Toll Plaza is situated at Parsoni on N.H. 28, Kotwa-Mehsi-Muzaffarpur Section. It is not mentioned that merely because the Toll Plaza was to be set up in Bihar, how cause of action has arisen in Bihar when every act was done in Delhi. The petitioner has also not set out even a single fact out of the bundle of facts so as to constitute any cause of action for the petitioner to maintain this writ petition before this Hon'ble Court. In absence of any fact with regard to the cause of action in Bihar, it could not be mentioned in the counter affidavit, but the issue of cause of action being an issue of jurisdiction is pure question of law to be raised in the proceeding even without formal pleading.

10. Apart from the Clause of the RFP, even from the facts of this case, as stated above, no part of cause of action arose in Bihar to invoke the Writ jurisdiction of this Hon'ble Court. Admittedly, the LOA was issued from Delhi and was served on the petitioner in Delhi. The said LOA was also withdrawn in Delhi which letter was also communicated to the petitioner in Delhi. The LOA was admittedly withdrawn before entering into the Agreement. Here, it is important to mention that it is in the

Agreement in Clause 6, which has been specified about the commencement and termination of user fee collection. Clause 8 mentions about place of collection in a particular State. In the Proforma of the contract, the State is not mentioned which could have been filled up while entering into the agreement. Similarly, Clause 10 of the contract Proforma provides for handing over the user fee plaza. Thus, before entering into the agreement even the location of the Plaza has not yet been mentioned. Thus, no part of cause of action arose in Bihar.

11. In support of his contentions, Mr. S.D. Sanjay, learned Senior Counsel appearing on behalf of the respondent-NHAI has relied on a judgment of the Hon'ble Apex Court in the case of *Swastik Gases Private Ltd. v. Indian Oil Corporation Ltd,* reported in *(2013) 9 SCC 32- Paras 31 to 34).* In this case, the Hon'ble Apex Court has held that when the parties to the agreement choose jurisdiction of a particular court as per the agreement, then the jurisdiction of the other courts will be excluded. It would be relevant to quote paragraphs 31 to 34 of the said judgment :

> *"31. In the instant case, the appellant does not dispute that part of cause of action has arisen in Kolkata. What appellant says is that part of cause of action has also arisen in*

Jaipur and, therefore, Chief Justice of the Rajasthan High Court or the designate Judge has jurisdiction to consider the application made by the appellant for the appointment of an arbitrator under Section 11. Having regard to Section 11(12)(b) and Section 2(e) of the 1996 Act read with Section 20(c) of the Code, there remains no doubt that the Chief Justice or the designate Judge of the Rajasthan High Court has jurisdiction in the matter. The question is, whether parties by virtue of clause 18 of the agreement have agreed to exclude the jurisdiction of the courts at Jaipur or, in other words, whether in view of Clause 18 of the agreement, the jurisdiction of Chief Justice of the Rajasthan High Court has been excluded ?

32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like 'alone', 'only', 'exclusive' or 'exclusive jurisdiction' have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties - by having clause 18 in the agreement – is clear *and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for construction of jurisdiction clause, like clause 18 in the agreement, the maxim expressio unius est exclusio alterius comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.*

33. The above view finds support from the decisions of this Court in Hakam Singh, A.B.C. Laminart, R.S.D.V. Finance, Angile Insulations, Shriram City, Hanil Era Textiles and Balaji Coke.

> *34. In view of the above, we answer the question in the affirmative and hold that the impugned order does not suffer from any error of law. The civil appeal is, accordingly, dismissed with no order as to costs. The appellant shall be at liberty to pursue its remedy under Section 11 of the 1996 Act in the Calcutta High Court."*

12. The learned counsel for the respondents has further relied on the judgments of the Hon'ble Apex Court in the following cases:

(1994) 4 SCC 711—O.N.G.C. Vs. Utpal Kumar Basu, Paragraphs 2, 3, 5, 6, 7, 12.

(2004) 6 SCC 254— Kusum Ingots & Alloys Ltd. Vs. U.O.I. & Ors., Paragraphs 6, 7, 8, 9, 10, 18, 19, 22 & 30

2016 (3) PLJR 870—Sunil Kumar Yadav Vs. Union of India.

13. The petitioner has relied on the judgment in the case of *Nawal Kishore Sharma v. Union of India*, reported in *(2014) 9 SCC 329*. The petitioner has shown only paragraph 18, but the ratio of this case is decided in paragraph 16 whereas the observation in paragraph 18 is merely a passing reference in the peculiar facts of this case. In paragraph 17 of this judgment, it has been held that in order to maintain a writ petition, the petitioner

has to establish that a legal rights claimed by him has been infringed by the respondent within the territorial limit of the courts jurisdiction. The court also considered the facts pleaded in paragraph 17 of the writ petition. It also considered the disability of the petitioner and his entitlement of disability pension at his native place. Thus, the legal principle decided in this case is the same, what is being contended by the respondents. However, the facts are distinguishable. It would be useful to reproduce paragraphs 16 and 18 of the judgment passed in *Nawal Kishore Sharma (supra):*

> ***"16.*** *Regard being had to the discussion made hereinabove, there cannot be any doubt that the question whether or not cause of action wholly or in part for filing a writ petition has arisen within the territorial limit of any High Court has to be decided in the light of the nature and character of the proceedings under Article 226 of the Constitution. In order to maintain a writ petition, the petitioner has to establish that a legal right claimed by him has been infringed by the respondents within the territorial limit of the Court's jurisdiction.*
>
> ***18.*** *Apart from that, from the counter affidavit of the respondents and the documents annexed therewith, it reveals that*

> *after the writ petition was filed in the Patna High Court, the same was entertained and notices were issued. Pursuant to the said notice, the respondents appeared and participated in the proceedings in the High Court. It further reveals that after hearing the counsel appearing for both the parties, the High Court passed an interim order on 18.9.2012 directing the authorities of Shipping Corporation of India to pay at least a sum of Rs.2.75 lakhs, which shall be subject to the result of the writ petition. Pursuant to the interim order, the respondent Shipping Corporation of India remitted Rs.2,67,270/- (after deduction of income tax) to the bank account of the appellant. However, when the writ petition was taken up for hearing, the High Court took the view that no cause of action, not even a fraction of cause of action, has arisen within its territorial jurisdiction."*

14. It is also well settled that the conferment of jurisdiction is a legislative function and it cannot be conferred with the consent of parties or even by the superior court. Any decree of a court having no jurisdiction will be nullity as it goes to the root of the case. It has been so held by the Supreme Court in the case of *Jagmittar Sain Bhagat v. Health Services, Haryana,*

reported in *(2013) 10 SCC 136,* paragraphs 9 to 11.

15. Thus, it was contended by the respondents that in the present case, even though the issue of jurisdiction was raised at the first instance by the answering respondent by filing its counter affidavit, but the issue was never addressed or decided while passing the interim order. Even the interim order was not with respect to the subject-matter but was only with respect to restraint on encashment of Bank guarantee which was already encashed by the respondent. Thus, even the interim order was not relevant so far as the writ petition that had become infructuous even in the year 2012 when the fresh bid was not interfered for the collection of fees and by now number of agencies were appointed to collect toll at the Toll Plaza. Thus, all the prayers of the petitioner made in the writ petition or even by way of interlocutory application became infructuous by efflux of time and the writ petition is fit to be rejected.

16. The claim of the petitioner now with regard to return of the securities has neither been prayed nor been pleaded either in the writ petition or even by subsequently filing interlocutory application which could not have been granted in absence of any prayer in the writ petition. Hence, the writ petition is liable to be dismissed.

17. Mr. Abhay Kumar Singh, learned Senior Counsel appearing on behalf of the petitioner has seriously controverted the contentions of the respondents in raising the plea of territorial jurisdiction at the penultimate stage of the proceedings. In this respect, learned counsel for the petitioner has referred to a judgment of the Apex Court cited in *(2014) 9 SCC 329*, Paragraph 18, *[Nawal Kishore Sharma V. Union of India]*. It was contended that the plea of want of jurisdiction ought to have been raised at the initial stage when the writ petition was placed for admission or at the time of passing of the interim order. Such a plea having been raised much thereafter is fit to be rejected. It was submitted that the order dated 13.05.2013 was passed, in which the petitioner's prayer for amendment in I.A. No.3089 of 2013, seeking to set aside the order dated 04.12.2012, by which the NHAI has withdrawn the Letter of Award (LOA) without prejudice to any other right available to the NHAI, was allowed; more so the respondents were also directed by the interim order dated 13.05.2013 that if the performance guarantee had not been paid by the Bank in favour of the NHAI, then the amount shall not be paid and if paid, it shall not be withdrawn by the respondent-NHAI until further orders of the Court. Thus, the learned counsel for the petitioner submitted that the writ

application had well been entertained by this Court and once having been entertained, it was not open at this stage for the respondents to raise any such preliminary objection with regard to the territorial jurisdiction of this Court.

18. Further, learned counsel for the petitioner stated that Order No.14 passed in this case indicates that the matter stood virtually concluded on 22.03.2017, wherein this Court had also entertained the application and no such objection had been raised and this Court had directed the respondent-NHAI to seek clarification on certain issues, which yet remain to be answered by them.

19. With regard to the question of jurisdiction of this Court, learned counsel for the petitioner submitted that the bidding process concluded with the issuance of Letter of Award in favour of the petitioner, therefore, the petitioner will not be guided by Clause 25 of the bidding document. Learned counsel for the petitioner submitted that with the issuance of Letter of Award, the process of bidding came to an end and it is evident that on 27.02.2012, the Letter of Award was issued and copy of the same was forwarded to the Project Director at Muzaffarpur and also to the Patna Regional Office. Thus, the subject-matter, situs of the action came to be brought into Bihar, thus attracting

the jurisdiction of this Hon’ble Court.

20. Referring to Aiyar’s Law Lexicon, Volume I, learned counsel for the petitioner has sought to explain the concept of what is Bid. “Bid” is an offer to give a price for an article about to be sold in auction. A BID AT AN AUCTION is nothing more than an offer and can be withdrawn like all other offers before it is accepted by the other party which, in the case of an auction, is signified by the fall of the hammer. However, A BID AT AN AUCTION is nothing more than an offer.

21. Thus, in the instant case, the Bid came to an end with the acceptance of the offer made by the petitioner and issuance of the Letter of Award, which was issued on 27.02.2012, and would not attract Clause 25 of the Agreement.

Further, it was contended by the learned counsel for the petitioner that even if a fraction of the cause of action is within the jurisdiction of this Court, the writ is maintainable.

22. The letter dated 27.02.2012 (Annexure 4), being the letter of acceptance of the offer made by the petitioner for collection of USER Fee by the fee collecting agency selected on the basis of the competitive bidding at Parsoni Toll Plaza, located at Km. 468.800 on Km. 520.000 to Km. 440.000 (Muzaffarpur-Kotwa-Mehsi) of National Highway No.28 in the State of Bihar,

having been accepted by the competent authority, clearly shows that the part of the cause of action came to be in Bihar. Thereafter, the petitioner invested several lacs into the project after receipt of the Letter of Award. Thus, all actions were taken by the respondents against the petitioner only after the issue of Letter of Award. This aspect of the matter has been clearly stated by the petitioner in paragraph 19 of the writ application and rescinding the contract would render the petitioner substantial and irreparable loss and injury. In support of his contention, learned counsel for the petitioner has also relied on a decision of the Apex Court cited in the case of *Madhav Rao Scindia Bahadur etc. v. Union of India [(1971) 1 SCC 85].*

23. The territorial jurisdiction has to be decided on consideration of what would be the meaning assigned to the "cause of action" as given in Section 20(c) of the Code of Civil Procedure, 1908, for the purposes of Article 226(2) of the Constitution of India. For this purpose, it would be necessary to refer to Section 20(c) of the Code of Civil Procedure for determining the meaning of "cause of action":

> ***"20. Other suits to be instituted where defendants reside or cause of action arises.****— Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local*

limits of whose jurisdiction—

(a) ……………………………

(b) ……………………………

(c) *the cause of action, wholly or in part, arises."*

The expression "cause of action" is tersely defined in Mulla's Code of Civil Procedure:

> *"The 'cause of action' means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court."*

In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant.

24. Coming to the question of power of the High Court to issue certain writs in the case of Nawal Kishore Sharma (supra), referred to by the petitioner, it has been held in paragraph 9 as follows :

> ***9***. *The interpretation given by this Court in the aforesaid decisions resulted in undue hardship and inconvenience to the citizens to invoke writ jurisdiction. As a result, Clause (1-A) was inserted in Article 226 by the Constitution (Fifteenth) Amendment Act, 1963 and*

subsequently renumbered as clause (2) by the Constitution (Forty-second) Amendment Act, 1976. The amended clause (2) now reads as under:-

> ***"226. Power of the High Courts to issue certain writs –***
>
> *(1) Notwithstanding anything in Article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.*
>
> *(2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding*

that the seat of such Government or authority or the residence of such person is not within those territories.

(3) xxxxx

(4) xxxxx"

On a plain reading of the amended provisions in Clause (2), it is clear that now High Court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. Cause of action for the purpose of Article 226 (2) of the Constitution, for all intent and purpose must be assigned the same meaning as envisaged under Section 20(c) of the Code of Civil Procedure. The expression cause of action has not been defined either in the Code of Civil Procedure or the Constitution. Cause of action is bundle of facts which is necessary for the plaintiff to prove in the suit before he can succeed. The term "cause of action" as appearing in Clause (2) came up for consideration time and again before this Court.

25. In the same judgment at paragraph 18, this Court has decided the matter in the following manner :

"18. *Apart from that, from the counter-*

affidavit of the respondents and the documents annexed therewith, it reveals that after the writ petition was filed in the Patna High Court, the same was entertained and notices were issued. Pursuant to the said notice, the respondents appeared and participated in the proceedings in the High Court. It further reveals that after hearing the counsel appearing for both the parties, the High Court passed an interim order on 18.9.2012 directing the authorities of Shipping Corporation of India to pay at least a sum of Rs.2.75 lakhs, which shall be subject to the result of the writ petition. Pursuant to the interim order, the respondent Shipping Corporation of India remitted Rs.2,67,270/- (after deduction of income tax) to the bank account of the appellant. However, when the writ petition was taken up for hearing, the High Court took the view that no cause of action, not even a fraction of cause of action, has arisen within its territorial jurisdiction."

26. Having heard the parties at length on the question of jurisdiction, while taking note of various decisions cited by the learned counsel appearing on behalf of the respondents and also the learned counsel for the petitioner, it appears to this Court that till date no issue was ever raised with regard to the question of jurisdiction. The matter was heard on several occasions by this

Court and an interim order was passed in favour of the petitioner, but all the respondents did at that stage was to make a contest with regard to the issuance of interim relief. The matter traversed down the years and even on the last occasion, when the matter was taken up, no such issued was raised by the respondents. It is only after this Court, noticing some discrepancies and having raised some queries, the respondents instead of answering the same have bounced this issue before this Court.

27. The Division Bench of this Court has decided the matter in the case of *Nawal Kishore Sharma v. Union of India*, which matter went up to the Apex Court and was decided in *(2014) 9 SCC 329*. Paragraphs 18 and 19 of the said judgment clearly state that after the Court had entertained the application and passed interim orders, the writ petition ought not to have been dismissed for want of territorial jurisdiction. A similar view has also been taken by the learned single Judge of this Court in the case of *Harihar Prasad v. Union of India,* reported in *2009(4) PLJR(HC) 892,* decided on 21.09.2009, wherein this Court has held that while dealing with the issue that the plea of alternative remedy which has been raised as an objection that if such an objection had been taken at a later juncture, the application ought not to have been dismissed.

28. Having heard the parties at length and on consideration of the present facts and circumstances of the case and also because part of the situs of the cause of action lies within the State of Bihar where the petitioners have invested a substantial amount towards establishing the Toll Plaza at Parsoni on National Highway-28, a right had also accrued to him which was sought to be violated by the respondents, giving rise to a cause of action. The Letter of Award having already been issued and on the basis of which the petitioner embarked on the process of its performance within the State of Bihar, when the impugned order has been issued, thus, this Court holds that raising the issue of territorial jurisdiction at this stage cannot be sustained and is, accordingly, rejected. The case shall now be decided on its own merit.

29. Coming to the issue raised in the writ application, learned counsel for the petitioner submitted that the impugned order is wholly against the principle of fair play and justice inasmuch as after issuance of letter dated 23.05.2012, the petitioner was issued a show cause notice through e-mail proposing to terminate the contract even on the ground that the petitioner has submitted a false certificate of Net Worth, which tantamounts to violation of Clause 2 of the RFP. The show cause

notice alleged that on detailed examination, the NHAI has found that the petitioner's Net Worth is only Rs.4.93 crores and not Rs.16.15 crores as submitted by the petitioner in its bid. At this juncture, it would be appropriate to refer to Clause 2(d) of the Bid Document (Annexure 2), which is Instructions to Bidders. Clause 2(d) is quoted hereunder:

> *(d) In case it is found during the evaluation or at any time before signing of the contract or after its execution and during the period of subsistence thereof, including the concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Bidder or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet issued the (letter of acceptance) LOA or entered into of the contract, and if the Bidder has already been issued the LOA or has entered into the contract, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Bidder, without the Authority being liable in any manner whatsoever to the Bidder."*

30. Learned counsel for the petitioner submits that in

this context, the LOA had already been issued to the petitioner and thereafter the petitioner had commenced to perform bid/contract by investing a substantial amount for setting up a Toll Plaza. However, the respondents for reasons best known to themselves and on some unilateral examination came to the conclusion that the Net Worth certificate dated 12.11.2011 submitted by the petitioner was a forged certificate of a C.A. Firm and thus having made material misrepresentation, the agreement with them was liable to be terminated and accordingly issued a show cause notice to them.

31. Learned counsel for the petitioner further submitted that according to the show cause notice, the Net Worth of the Company is allegedly Rs.4.93 crores, which is more than the required minimum Net Worth to qualify to bid. Even if 10% of the financial capacity requirement is increased by invoking sub-clause (ii)(b) of Clause 1 of Section 2 of the RFP, the petitioner still has more than the required Net Worth. Thus, the question of terminating the contract of the petitioner under Clause 2(d) of the RFP does not arise. Moreover, the notice does not disclose as to what was the basis of the finding that the petitioner had submitted a fraudulent certificate of a C.A. firm, which amounted to material misrepresentation.

32. Over and above, the learned counsel for the petitioner contended that the authorities had pre-judged the matter and had issued the notice as an empty formality, which is itself evident from the fact that close on the heels of Annexure 8 dated 18.10.2012, another Notice Inviting Tender was issued by the NHAI on 23.10.2012 for the same Highway/Parsoni Fee Plaza. This clearly indicated that the show cause was an empty formality and part of the post-decisional exercise. It was under such circumstances that the petitioner was constrained to move this Court as submission of show cause notice would be nothing but a futile endeavour on the part of the petitioner and the respondents would only be receiving it to reject the same. Thus, the impugned notice and the order passed thereafter terminating the contract with the petitioner stand vitiated and calls for its interference by this Court under its extraordinary jurisdiction.

33. Coming to the merits of the case, on perusal of the impugned order (Annexure 8), it appears that the case of the petitioner has been negated on the ground that the Chartered Accountant firm had issued a false certificate in favour of the petitioner, which was not correct as large amount has been indicated.

34. It was submitted by the U Toll (petitioner-

Corporation) that the Letter of Acceptance (LOA) dated 27.02.2012 for engaging U Toll Corporation for collection of user fee at Parsoni fee plaza for Muzaffarpur-Kotwa-Mehsi Section from Km 520.00 to Km 440.00 on NH-28, in the State of Bihar was wholly legal and justified and the show cause notice, bearing Letter No.NHAI/13013/547/CO/10-11/Competitive bidding, dated 18.10.2012, received by them, was wholly baseless, biased and based on the premise of hypothesis and assumptions. The petitioner vehemently denied that UTCL has submitted a false certificate for securing the bid and the Net Worth certificate submitted by them was correct. The petitioner further submitted that a detailed examination of the documents ought to have been made by professionals, based on international norms and standards, which were binding on both the parties as the UTCL has no role to ascertain the fact of the case.

35. It was submitted by the petitioner that the show cause notice was duly answered by them and the various documents, which had been issued by the Chartered Accountant, which were the certificates dated 28.05.2011, 13.04.2012 and 23.08.2012, were based on the same documents and under strict guidelines prescribed and applicable to any corporate entity (Annexure-4).

36. The certificate for Net Worth was issued in terms of NHAI letter dated 30.07.2012 and the meeting of the Chartered Accountant with the NHAI in their Office, which was held for clarifying the details about the previous certificate issued by the Firm. The documents submitted for getting the Net Worth Certificate for all the three dates were the same and the difference in the Net Worth certificate was due to consideration of market value of only those properties for which valuation report was provided and available with them on the dates of certificate. However, the NHAI without making any physical verification of all the immovable properties of the UTCL has come to the said finding.

37. To justify their *bona fide*, the petitioner has clarified that they had no intention to mention any inflated Net Worth and besides that, there was no relation to the tender participated vis-à-vis the Net Worth. It is relevant to mention the detail of tenders, in which UTCL participated during the last 12 months from the date of certificate:

S.No	**Name of Plaza**	**APC(in Rs. Cr.)**	**Net Worth Required (in Cr.)**
1	Naini Bridge	7.91	2.64
2	Tundla	16.95	5.65
3	Sanjay Setu	1.52	0.51

4	Hariabara	3.2	1.07
5	Surjapur	21.16	7.05
6	ROB Kishangarh	4.93	1.64
7	Parsoni	13.58	4.53
8	Roha Nagaon Bypass	7.08	2.36
9	Naini	7.91	2.64
10	Asanpur	8.51	2.84

Thus, so far as Parsoni tender was concerned, the Net Worth required in crores was only 4.53 and, therefore, Net Worth submitted to the NHAI for the said was 13.58. The Net Worth submitted to the NHAI on different dates is listed hereunder:

Dated 28.05.2011 Rs.6.75 Crore

Dated 12.11.2011 Rs.16.15 Crore

Dated 13.04.2012 Rs. 18.60 Crore

38. In the show cause, the petitioner had submitted that the C.A. Net Worth Certificate indicated the valuation of the property at different stages put together and there was no intention whatsoever to mention inflated Net Worth. The petitioner had nothing to do with the certificate as the CA issued the certificate for Net Worth dated 12.11.2011 and the valuation of 5, out of 7 properties was taken into consideration, in the certificate dated

28.05.2011, valuation of 2 out of 7 properties was taken and finally in the certificate dated 13.04.2012, valuation of 6 out of 7 properties had been considered. In fact, the Net Worth of UTCL would have further increased if the current valuation for all the properties would have been considered. As far as considering the current value of the property over book value is concerned, it was in the best judgment of the certifying agency-C.A. firm and disclosure of methodology have already been made in the certificate dated 12.11.2011.

39. Learned counsel for the petitioner further contended that in order to conclude any *mala fide* intention on the part of the petitioner by furnishing C.A. Net Worth certificate, there should have been a need to have higher Net Worth whereas Parsoni required only a Net Worth of 4.53 crores and since UTCL as a group have enough Net Worth to participate in the toll tender, there was no need to furnish false information to secure the Bid in their favour.

40. Referring to Annexure 8, which is the show cause notice dated 18.10.2012, learned counsel for the petitioner submitted that apparently the authorities have pre-judged the matter inasmuch as they had come to a finding that the certificate dated 12.11.2011 of the C.A. firm, which reflected the Net Worth

of Rs.16.15 Crore for the financial year 2010-11 was a "forged certificate" and, therefore, having submitted a false Net Worth Certificate, they were guilty of violation of Clause 2(d) of Section II of RFP and they were called upon to show cause as to why actions for terminating the LOA and forfeiture of performance security be not taken against them. Further, the reply to the show cause was to be submitted within ten days from the date of receipt of the notice and they were also given an opportunity to represent their cases personally by taking prior appointment with the General Manager of the Authority before expiry of the said period of reply.

41. However, close on the heels of the aforementioned notice, the authority proceeded to issue another NIT on 23.10.2012, just five days after the issuance of Annexure 8. This clearly indicated that the issuance of the show cause notice was but an empty formality as the respondents had already decided to terminate the contract of the petitioner and reply, which was to be filed by the petitioner would necessarily be a futile exercise. What followed was to the apprehension of the petitioner as the NHAI, vide order dated 04.12.2012 (Annexure 11), withdrew the Letter of Award of the petitioner with immediate effect, which came under challenge in I.A. No.3089 of 2013.

42. This Court, while considering the aforementioned

interlocutory application, had ordered that since there was no order forfeiting the performance security and since the petitioner had been informed by its Banker that the same was sought to be invoked without any decision by the authority to the said effect in the impugned notice, a direction was issued to the Bank of Baroda that if the Bank guarantee had not been paid to the respondent-NHAI, the same would not be paid until further orders of this Court.

43. The NHAI has argued the matter at length and has tried to justify their action by stating that the authority had initiated action against the petitioner on the basis of a complaint dated 11.05.2012 received from Hon'ble Member of Parliament, stating that the petitioner was using false and fraudulent balance sheet and Net Worth certificates for gaining the control of the Toll Plazas in the NHAI. The NHAI thereafter resorted to an enquiry and report was submitted by one Fortress on 11.06.2012, which related to the Projects at NH-2 in the State of Uttar Pradesh, N.H.-27 in Uttar Pradesh and N.H.-28 in the State of Uttar Pradesh. This certificate (Annexure B) by Fortress Infrastructure Advisory Services, addressed to the NHAI, however, does not mention anything regarding the project of Bihar, which is sought to be cancelled by the impugned letters.

44. Referring to several judgments, the Highways Authorities have tried to persuade this Court that since the petitioner's LOA was issued on the basis of a fraudulent certificate, the withdrawal of the said Letter of Award was wholly justified and the performance security for the issuance of such LOA was liable to be forfeited.

45. In the considered opinion of this Court, there being no finding of fraud against the petitioner with regard to the grant of Letter of Award with regard to collection of user fee at Parsoni fee plaza for Muzaffarpur-Kotwa-Mehsi Section from Km 520.00 to Km 440.00 on NH-28, in the State of Bihar and the complaint being based on extraneous reasons and being purely false, the award of contracts at Uttar Pradesh, for which Annexure B had been furnished by their own agency with regard to Projects in U.P., the same cannot be made to apply in the case of the present Letter of Award, which has been cancelled by the respondents. The respondents have also failed to answer the specific query made by this Court in this regard on 22.03.2017 and when accosted with the same, have resorted to address this Court on the limited question of jurisdiction, which as held earlier, cannot be raised at this stage.

46. In the result, the writ application is allowed. The impugned show cause notice No.NHAI/13013/547/CO/10-

11/Competitive Bidding dated 18.10.2012, as contained in Annexure 8 to the writ application, as well as the fresh Tender Notification No.NHAI/13013/547/CO/11-12/ Competitive Bidding dated 23.10.2012, as contained in Annexure 9 to the writ application, and the order dated 04.12.2012, bearing No.NHAI/13013/547/CO/11-12/Competitive Bidding, as contained in Annexure 11 to I.A. No.3089 of 2013, are set aside and quashed. However, in the facts and circumstances, there shall be no order as to costs.

47. It goes without saying that the Bank guarantee sought to be invoked also cannot be released in favour of the NHAI and if already released, are to be refunded to the petitioner-Corporation.

(Anjana Mishra, J)

PNM

AFR/NAFR	A.F.R.
CAV DATE	15.05.2017
Uploading Date	12.12.2017
Transmission Date	N.A.