



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 26.11.2018

CORAM:
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
W.P(MD)No.22775 of 2018
and
W.M.P (MD)No.20651 of 2018

K.Ramachandran

... Petitioner

Vs.

1.The Union of India,
Rep. by its Secretary to Government,
Ministry of Road Transport and Highways,
New Delhi.

2.The National Highways Authority of India,
Rep. by its General Manager (Commercial Operation),
G-5 & 6, Sector - 10,
Dwarka,
New Delhi - 110 075.

3.The Regional Officer-Madurai,
National Highways Authority of India,
2 & 3 Floor, Vijaykrishna Plaza,
No.1, Lake Area, Melur Main Road,
Mattuthavani,
Madurai - 625 007.

... Respondents

PRAYER: Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records in pursuant to the impugned order passed by the third respondent in NHAI/14011/01/2018/RO Madurai/2158, dated 05.11.2018 and quash the same and forbear the second and third respondents from taking punitive actions of blacklist the petitioner K.Ramachandran from bidding to further tolling contracts of NHAI until the disposal of the petitioner's representation dated 07.10.2018 and 08.10.2018 submitted to the second and third respondents for pre-mature termination of contract agreement, dated 05.10.2018.

For Petitioner	: Mr.P.Jeyaprakasam
For R - 1	: Mr.M.Karthikeyavenkitachalapathy
For RR 2 & 3	: Mr.Su.Srinivasan

ORDER

This Writ Petition is filed seeking for issuance of a Writ of Certiorarified Mandamus, to quash the impugned order passed by the third respondent in NHAI/14011/01/2018/RO Madurai/2158, dated 05.11.2018 and further forbear the second and third respondents from taking punitive action from blacklisting the petitioner from bidding



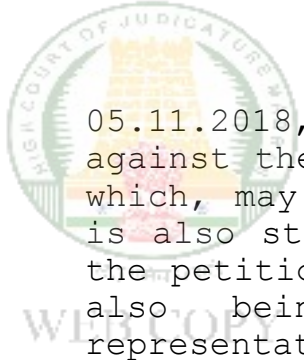
to further tolling contracts of NHAI until the disposal of the petitioner's representations, dated 07.10.2018 and 08.10.2018, which has been forwarded to the second and third respondents for pre-mature termination of contract agreement, dated 05.10.2018.

2. The case of the petitioner is that the petitioner entered into a contract agreement with the second respondent, who is empowered under the provisions of the National Highways Authority of India Act, 1988 to collect user fees on behalf of the Central Government for services or benefits rendered under National Highways Act, 1956, on 05.10.2018 based on e-quotations on e-portal of NHAI invited by the second respondent from pre-qualified bidders and as such, the petitioner was a successful bidder for collection of user fee for a period of three months or till appointment of new agency by NHAI, whichever is earlier, at Vagaikulam fee plaza at Km. 17000 (km 34.250 of erstwhile NH-7A) for the section from Km 4,000 to Km 51,200 (revised chainage km 0.000 to km 47.250 (Tirunelveli - Tuticorin section) on NH-138.

3. The petitioner stated that as per the contract, the daily remittance amount payable by the bidder to the authority is a sum of Rs.7,10,000/-. As the toll collected in the plaza is very low as against the expected rate fixed by NHAI and due to heavy loss incurred, the petitioner submitted a representation, dated 07.10.2018 to the second respondent for pre-mature termination of contract. It is further stated that again on 08.10.2018, the petitioner submitted representation to the third respondent. The third respondent has also sent a letter, dated 09.10.2018, to the NHAI, Headquarters to consider the petitioner's request of pre-mature termination of contract agreement.

4. In the meanwhile, the second respondent conducted e-binding on 17.10.2018 and also on 31.10.2018 and the petitioner also participated in the bidding, but no one was awarded the contract, for the reasons best known to the second and third respondents. The petitioner has submitted an explanation, dated 30.10.2018 by narrating the difficulties faced by the petitioner viz., the local people who makes issue not to pay toll fee; labour problem and also less vehicles are passing due to closure of sterlite Industry. The petitioner has also submitted the original collection report from 06.10.2018 to 30.10.2018 and also the report of the Project Director to the respondents. The Project Director cum Deputy General Manager (Tech), Tuticorin sent a communication, dated 04.11.2018, wherein it is stated that he will recommend the competent authority for taking necessary action as per the agreement and also NHAI rules.

5. The petitioner further states that the respondents have not considered the statement enclosed along with the communication that he has paid the actual collection amount to the tune of RS.1,06,22,000/- to the credit of NHAI. Without considering the same, the third respondent has passed the impugned order, dated



05.11.2018, insisting the petitioner to pay a sum of Rs.64,61,755/- against the performance security to have the contract live. Failing which, may lead to take legal action as per Contract Agreement. It is also stated that punitive actions of blacklisting the agency of the petitioner from bidding to further tolling contracts of NHAI is also being considered/recommended. The petitioner sent a representation to the second respondent to consider the loss incurred by him and to pre-terminate the contract agreement as per Clause 25(b)(iii) Force Majeure Event. Since the second and third respondents have not considered the same and they are trying to take punitive action against the petitioner and black listing their agency, the petitioner has approached this Court by way of filing this Writ Petition.

6. Heard the learned counsel appearing for the petitioner, the learned counsel appearing for the first respondent and the learned counsel appearing for the respondents 2 and 3.

7. It is seen from the records that on 05.10.2018, a contract agreement has been entered between the petitioner and the second respondent, in which the petitioner has to pay a sum of Rs.7,10,000/- as daily remittance amount and he has also remitted the same. There were so many terms and conditions, which were all signed by the petitioner herein and he has also accepted for the said clauses.

8. Clause 23 relates to 'Obligations of the contractor' and Clause 23(e) provides that *"the contractor shall, prior to the close of each day, send to the Authority, by facsimile or e-mail, a report stating accidents and unusual occurrences on the Road Section within meters on either side of the plaza relating to the safety and security of the Users and Road Section. A weekly and monthly summary of each reports shall also be sent within three days of the enclosing of each week and month, as the case may be"*.

9. Clause 23(d) provides that *"during the contract period, the contractor shall furnish to the Authority, within seven days of completion of each month, a statement of User Fee substantially in the form set forth in Schedule -V (the "Monthly User Fee Statement"). Proper record is to be maintained at the plaza for the purpose of providing such information. The Contractor shall also submit such information sought by the Authority in such format, as may be prescribed by the Authority from time to time."*

10. Clause 24 deals with "right of inspection" and as per Clause 24(iv) daily remittance of amount due from the contractor by the prescribed day has to be maintained.

11. Clause 25 deals with Force Majeure, which reads as follows:-
<https://hcservices.ecourts.gov.in/hcservices/>

"(a) Non-Force Majeure Event:-

An event (i) which involves diversion of traffic of



any kind, including but not limited to any diversion ordered/implemented by local authority or any State/Central Government for a period not exceeding 15 days in continuation; or (ii) where the road users opt to access/travel through the existing alternate free User Fee (too) roads due to deteriorated road conditions/maintenance of road section. This may result into bypassing of User Fee Plaza/User Fee Collection Booths and use of any part of the said Section of the National Highway/said bridge by the users.

(b) Force Majeure Event:-

Except as stated in clause (a) above, Force Majeure event means an event or circumstances or a combination of events and circumstances referred to in this clause which are beyond the reasonable control of the party or parties to this contract and which party could not have prevented or reasonably overcome with the exercise of its reasonable skill and care in relation to performance of its obligations pursuant to this contract and which are of the nature, without limitation of those described below:

(i) Publicly declared strike by registered and recognised association of Transporters exceeding 7 days. The date of going on strike and withdrawal or start of movement of traffic will be inclusive for the purpose of calculation of 7 days under this clause.

(ii) Floods/Earthquake having materially adverse impact ie., complete blockade of road.

(iii) Act of war, invasion, armed conflict or act of foreign enemy, unexpected call up armed forces, blockade, embargo, revolution, riot, sabotage, terrorism or act of such threat, or any other political or social event having material adverse impact on the performance of obligations of the parties thereof.

(iv) Expropriation, acquisition, confiscation or nationalisation of the User Fee collection.

(v) Any change in law which has a material adverse effect on the obligation of the parties hereto.

(vi) Any decision or order of a Court or Tribunal, which has a material adverse effect on the performance of obligations of the parties to this contract.

(vii) Suspension of traffic on the said Section of National Highways/said bridge or any part thereof, exceeding 15 days at a stretch.

(viii) Any event or circumstances of a nature analogous to the foregoing."

12. Clause 35 deals with 'Termination' and it is stated as follows:-

"within 30 days of taking over the toll plaza, if the



contractor feels that he has committed an error in assessing the realizable user fee at the toll plaza, he may in writing request of the contractor is irreversible by the contractor under any circumstances.

The contractor, even after making such request, shall continue to collect user fee at the toll plaza, remit the agreed remittances timely to the authority and comply with all other terms and conditions in accordance with this contract, till handing over of the toll plaza to the new agency.

The authority shall appropriate 25% of the performance security as mutually agreed genuine pre-estimated compensation and damages payable to the authority for interalia time, cost and effort of the authority. The balance performance security shall be released by the authority within 30 days of handing over of the toll plaza to the new agency.

Within 60 days of receipt of such request, the authority may complete the bidding process for selection of new agency, select the new agency and handover the toll plaza to the new agency. For avoidance of doubt, NHAI would finalize the new agency as early as possible, irrespective of the quotes of the contractor and the new agency. This agreement stands terminated automatically on the date of handing over of the toll plaza to the new agency."

13. Clause 27 deals with 'Arbitration' and the same reads as follows:-

"(a) All disputes and/or difference except those which are mentioned in the matters non-arbitral under Clause 26 above arising between the parties out of this contract shall be settled by Arbitration under and in accordance with the provisions of the Arbitration and Conciliation Act, 1996. The Chairman of the Authority or his nominee shall be the sole arbitrator. The award made and published in pursuance of such arbitration proceedings shall be final and binding on both the parties.

(b) The proceedings of the Arbitration shall be held in English language and shall be held at such place as may be decided by the Chairman of the Authority or his nominee. The award of the arbitration shall be final and binding on both the parties to the contract.

(c) Pending resolution of any dispute pursuant to Arbitration, under all circumstances the contractor shall continue to remit the agreed installments of money to the Authority as prescribed in this contract including when the dispute is about the amount to be remitted.

(d) The contract agreement shall be governed by and construed in accordance with the laws of India and the Courts at New Delhi shall have the exclusive jurisdiction



over all disputes arising under, pursuant to and/or in connection with the contract agreement."

14. As per Clause 25(b)(iii) of Force Majeure Event, due to closure of M/s.Sterlite Industries, the petitioner was not able to collect the fees, for which, the petitioner has not produced any accounts or any other materials to show that the collection of the said period was very low and he has occurred loss. The contention of the learned counsel for the petitioner that he was not able to pay the amount due to non-collection of fees and the same cannot be decided by this Court.

15. From the above materials produced before this Court, it is clear that the petitioner has to initiate Arbitration proceedings and this Court cannot entertain in such matters.

16. At this juncture, the learned counsel appearing for the petitioner also agrees that the petitioner will initiate proceedings under Arbitration and he prays that till such time, the respondents should not precipitate the issue by blacklisting him.

17. The learned counsel appearing for the respondents submitted that they will not take any action to blacklist the petitioner, till such proposals are taken up and his representation will be considered by the respondents and further stated that as per Clause 35, at present, somebody else has been appointed.

18. In view of the submissions made on either side, this Court directs the respondents to consider the representation of the petitioner and pass appropriate orders in accordance with law, after giving opportunity to the petitioner within a period of eight weeks from the date of receipt of copy of this order. It is left open to the petitioner to initiate proceedings in the competent forum.

19. With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

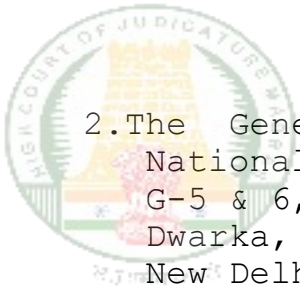
Sd/
Assistant Registrar(W)

/True copy/

Sub Assistant Registrar(CS-III)

To

1.Th Secretary to Government,
Union of India,
Ministry of Road Transport and Highways,
New Delhi.



2.The General Manager (Commercial Operation),
National Highways Authority of India,
G-5 & 6, Sector - 10,
Dwarka,
New Delhi - 110 075.

WEB COPY

3.The Regional Officer-Madurai,
National Highways Authority of India,
2 & 3 Floor, Vijaykrishna Plaza,
No.1, Lake Area, Melur Main Road,
Mattuthavani,
Madurai - 625 007.

+1cc to Mr.K.BALASUBRAMANI, Advocate, SR.No.96951

+1cc to Mr.M.KARTHIKEYA VENKATACHALAPATHY, Advocate, SR.No.96950

+2cc to Mr.SU.SRINIVASAN, Advocate, SR.No.97162,97431

W.P (MD) No.22775 of 2018
26.11.2018

PS

KK/PM/SAR-3/26.12.2018/7P-8C