



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **12.11.2019**

CORAM:

THE HONOURABLE **MR. JUSTICE M. SUNDAR**

W.P. (MD) Nos.12763 and 12769 of 2018

and

W.M.P. (MD) Nos.11646, 11652, 14042, 14211 and 14539 of 2018
and 18138 and 18141 of 2019

W.P. (MD) No.12763 of 2018:

A.K.Rajpriam

... Petitioner

Vs.

1.The Superintending Engineer,
National Highways,
Madurai-2.

2.The Superintending Engineer,
National Highways,
Tirunelveli.

... Respondents

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari calling for the records relating to the impugned order passed by the first respondent in his proceedings Lr.No.1077/2018/DO, dated 06.06.2018 and quash the same as illegal, without jurisdiction in violation of principles of natural justice.

W.P. (MD) No.12769 of 2018:

A.Kamaraj

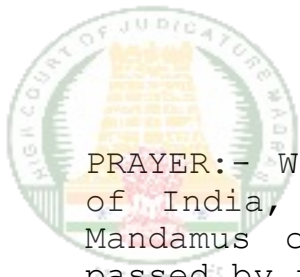
... Petitioner

Vs.

1.The Superintending Engineer,
National Highways,
Madurai-2.

2.The Superintending Engineer,
National Highways,
Tirunelveli.

... Respondents



PRAYER:- Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus calling for the records relating to the impugned order passed by the first respondent in his proceedings Lr.No.799/2018/DO, dated 30.05.2018 and quash the same as illegal, without jurisdiction in violation of principles of natural justice.

For Petitioner
in both petitions : Mr.B.Saravanan

For Respondents
in both petitions : Ms.S.Srimathy
Special Government Pleader

COMMON ORDER

This common order will dispose of these two writ petitions.

2. In this common order 'W.P.(MD)No.12763 of 2018' shall be referred to as 'I Writ Petition' and 'W.P.(MD)No.12769 of 2018' shall be referred to as 'II Writ Petition' for the sake of convenience and clarity. To be noted, this is based on the sequence in which numbers have been assigned to the two writ petitions.

3. Mr.B.Saravanan, learned Counsel on record for writ petitioners in both writ petitions and Ms.S.Srimathy, learned Special Government Pleader on behalf of both respondents in both writ petitions are before this Court.

4. With consent of both the learned Counsel, ie., learned Counsel for writ petitioners and learned State Counsel, main writ petitions are taken up, heard out and are being disposed of.

5. This Court is informed that the writ petitioner in I writ petition is the son of writ petitioner in second writ petition. Though it has no bearing on the controversy in these writ petitions, this is recorded only for the sake of completing facts.

6. Two separate orders one dated 06.06.2018 and another dated 30.05.2018 both made by the first respondent in both writ petitions ie., Superintending Engineer, National Highways, Madurai-2 have been called in question in I writ petition and II writ petition respectively ie., in these two writ petitions. For the sake of convenience and clarity, '06.06.2018 order bearing reference Lr.No.1077/2018/DO' shall be referred to as 'I impugned order' and '30.05.2018 order bearing reference Lr.No.799/2018/DO' shall be referred to as 'II impugned order' (impugned orders collectively). There is no disagreement that both these writ petitions arise out of a common factual matrix since the central theme / controversy in both these writ petitions is the same and this has impelled this



Court to pass this common order to dispose of these both writ petitions.

7. Undisputed facts are that writ petitioners are Class I contractors with the National Highways department and that their registration as Class I contractors were subsisting as on dates of impugned orders.

8. The writ petitioners who admittedly had unblemished records ran into rough weather when work of reconstruction of RCC slab culvert at certain specified kilometres in National Highways 208 was awarded to writ petitioner in I writ petition and the same work with regard to different kilometres in the same National Highways was awarded to writ petitioner in II writ petition. These two contracts shall hereinafter be referred to as 'said contract' for the sake convenience and clarity. It may not be necessary to advert to the exact kilometres and the nature of work as that is not imperative for appreciating this order. Suffice to say that said contract necessitated production of bank guarantees by the writ petitioners. This Court is informed that they are performance bank guarantees, it may not be necessary to dilate on details of the bank guarantees, their values and numbers. Suffice to say that there was a complaint that the bank guarantees produced by the writ petitioners qua said contract were forged and fake. This resulted in show cause notices being issued to the writ petitioners and writ petitioners sent identical replies. As replies are identical, suffice to say that the burden of the song in both the replies to the show cause notices by the two writ petitioners was the same. It is to the effect that one B.Samuel was employed by the writ petitioners to take care of their bank activities and the said Samuel had allegedly defrauded the writ petitioners by producing the fake bank guarantees. The explanations also go on to say that the writ petitioners have lodged a criminal complaint in the jurisdictional police station against said Samuel and that law has been set in motion to prosecute the said individual.

9. First respondent considered the replies and came to the conclusion that explanation given is not acceptable.

10. This leaves this Court with the undisputed scenario that the bank guarantees were admittedly fake. The writ petitioners have gone on to exculpate themselves by saying that until that point of time, they had unblemished records with good economic position and therefore there was no need or necessity to produce fake bank guarantees.

11. Be that as it may, suffice to say that the first respondent, holding that the explanation is not acceptable, passed the impugned orders cancelling the contracts as well as the registration of the writ petitioners as Class I contractors. The

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banned as also the names of the partners of the contractors and the allied concerns coming within the effective influence of the contractor. The Head of the Department concerned will forward the report of the Registering Authority to the Government in the administrative department concerned with his recommendation. A decision to ban a contractor for reason (i) above may be taken by the administrative department in consultation with the State Vigilance Commission and the Public (S.C) Department. For reason (ii) to (iv) above, the administrative department may take decision in consultation with the Public (S.C.) Department. Action for banning a contractor should be taken only where it is established that the offences was committed in order to secure advantage to the contractor and not where the object may be to secure advantage to the person concerned viz., employee, partner or representative of the contractor personally.'

13. Adverting to the aforesaid clauses 6.1 and 6.3 of Standardized Code for Works Contracts, learned Counsel for writ petitioner submits that the first respondent is not competent to cancel the registration which is effectively in the nature of ban and if that is to be done at all, the same can be done only by the Administrative Department of the Secretariat in consultation with the public department. Clause 6.3 of Standardized Code for Works Contracts also makes it clear that the Registering Authority will send to the Heads of the Department concerned through the next higher authority, a detailed report specifying the reasons for action before such a ban is clamped.

14. The response of the respondents to this ground of attack is interesting. In paragraph No.11 of the counter affidavit in W.M.P.(MD)No.14211 of 2018 which is also an affidavit supporting the petition to vacate interim order it has been mentioned that the impugned orders are only recommendations. Paragraph No.11 of the counter affidavit reads as follows:

'11. With regard to para 13 of the affidavit, it is submitted that the averment by the petitioner that one Mr.V.Krishnasamy is biased and there is an element of bias in passing the impugned order is not acceptable. It is submitted that no orders cancelling the work agreement is issued to the petitioner by Mr.Krishnasamy, in the capacity of Superintending Engineer, NH, Tirunelveli as averred by the petitioner. Mr.Krishnasamy, in the capacity of Superintending Engineer, NH, Tirunelveli has only **recommended** action against the contractor under Clause 6.2 (i) of Standardized code of Contractors Vide



Lr.No.585/2018/JDO, dated 04.04.2018. Mr.V.Krishnasamy, in the capacity as Superintending Engineer, NH, Madurai being the registering authority has only cancelled the registration of the petitioner.'

(**Underlining made by this Court to supply emphasis and highlight**).

15. Learned Counsel for writ petitioner drew the attention of this Court to paragraph No.6 of the counter affidavit W.M.P.(MD) No.14211 of 2018 wherein it is reiterated that it is a cancellation. Paragraph No.6 of the counter affidavit reads as follows:

'6.With regard to the averments contained in para 7 of the affidavit, it is submitted that the petitioner had indulged in a severe fraudulent activity. It is submitted that the petitioner should have scrupulously verified the documents which were produced for the contractual agreement and the bank guarantees could not be obtained by the manager himself without the knowledge of the employer and the petitioner should have questioned the manager himself in this regard. It is submitted that the petitioner being registered as a Class I Contractor, should have been very well aware of the procedures to obtain a bank guarantee. It is submitted that as per clause 4.1, of the Standardized code for works contractors which reads as the Registering authority is competent for suspension of business for an indefinite period where pending full enquiry into the allegations and such an order may be passed if the competent authority is prima facie of the view that the contractor is guilty of an offence involving moral turpitude in relation to business dealings which if established would result in banning business dealings with the contractor, the registration of the petitioner is cancelled. It is further submitted that the averments by the petitioner that he had not caused any monetary loss to the Government is not acceptable, since the performance security is a financial hold to the Government.'

(**Underlining made by this Court to supply emphasis and highlight**).

16. In paragraph No.14 of the affidavit, it has been averred that the impugned orders are ban orders.

17. In the light of the aforesaid backdrop, learned State Counsel on instructions submitted that the impugned orders are only recommendations and that the same will be carried to its logical end one way or other in accordance with the procedure laid down in the Standardized Code for Works Contracts.



18. Law is too very well settled that a impugned order has to speak for itself and it cannot be made by way of a counter affidavit. A leading judgment in this regard is **Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others** reported in **AIR 1978 SUPREME COURT 851**, wherein a Constitution Bench of Honourable Supreme Court held that the validity of impugned orders of this nature should be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. The most relevant paragraph in **Mohinder Singh Gill case** is paragraph No.8 and the same reads as follows:

'The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginnings may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p.18).

"Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language need in the order itself".

*Orders are not like old wine becoming better as they grow older.
A Caveat.'*

19. When the aforesaid scenario unfurled in the hearing, the trajectory gravitated, drifted and culminated in a consent order.

20. The consent order is as follows:

'(a) Impugned orders being order dated 06.06.2018 bearing reference Lr.No.1077/2018/DO and dated 30.05.2018 bearing reference Lr.No.799/2018/DO made by the first respondent in the writ petitions being the Superintending Engineer, National Highways, Madurai-2 are not set aside but are held to be as recommendations within the meaning of Standardized Code



for Works Contracts;

(b) The aforesaid recommendations shall be forwarded by the first respondent to the authorities concerned in accordance with aforementioned Code;

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(c) The authorities concerned shall thereafter deal with the matter in accordance with the records and merits of the explanation, after giving reasonable opportunity to all concerned and conclude the matter;

(d) Though obvious, it is made clear that in the light of consent order there will be no ban or cancellation of registration vide the impugned orders until a final decision is taken by the concerned competent authorities in accordance with Standardized Code for Works Contracts;

(e) Though obvious, it is made clear that this order will not in any manner impede the first respondent from exercising any other power which is vested in first respondent in the Standardized Code for Works Contracts.'

21. Writ Petitions are disposed of with the above directions. There shall be no order as to costs. Consequently connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CO)

// True Copy //

Sub Assistant Registrar(CS)

SSL

To

1.The Superintending Engineer,
National Highways, Madurai-2.

2.The Superintending Engineer,
National Highways, Tirunelveli.

+2CC TO MR.B.SARAVANAN, Advocate Sr. No.97980 & 97982
+1CC TO THE SPECIAL GOVERNMENT PLEADER SR.No. 98060

W.P.(MD)Nos.12763 and 12769 of 2018
12.11.2019

KM(CO)

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